Supreme Court of the United States

OCTOBER TERM, 1959

No. 64

UNITED STATES, APPELLANT,

v.

JAMES GRIGGS RAINES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

INDEX

	Original	Print
Record from the U.S.D.C. for the Middle District of Georgia, Americus Division		
Complaint	3	1
Exhibit "A"—Extracts from Georgia Voters' Registration Act approved March 25, 1958	10	9
Exhibit "B"—Extracts from Georgia Code of 1957 by Title and Section	14	12
Motion to dismiss under Rule 12B of the Federal Rules of Civil Procedure	21	17
Order of the Court as to defensive pleadings	28	22
Opinion, Davis, J.	32	24
Order dismissing complaint	55	41
Notice of appeal by the United States to the Supreme Court of the United States	56	42
Notice of cross-appeal by James Griggs Raines, et al.	59	43
Clerk's certificate (omitted in printing)	62	44
Order postponing jurisdiction	63	45

[fols. 1-2] • • •

[fol. 3] **IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA**

(File Endorsement Omitted)

Civil Action No. 442

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES GRIGGS RAINES, DIXON OXFORD, ROSCOE RADFORD, Registrars of Terrell County, Georgia, F. LAWSON COOK, SR., and MRS. F. LAWSON COOK, SR., Deputy Registrars, DEFENDANTS

COMPLAINT—Filed September 4, 1958

The United States of America, Plaintiff, brings this suit against James Griggs Raines, Dixon Oxford, and Roscoe Radford, members of the Board of Registrars of Terrell County, Georgia; F. Lawson Cook, Sr., and Mrs. F. Lawson Cook, Sr., Deputy Registrars, and alleges that:

1. This action is brought under Part IV of the Civil Rights Act of 1957 (P.L. 85-315, 71 Stat. 634, 42 U.S.C. Sec. 1971) to obtain preventive relief against acts and practices by the defendants which would deprive other persons of rights and privileges secured by subsection (a) of 42 U.S.C. 1971, namely the right and privilege of citizens of the United States who are otherwise qualified by law to vote at any election by the people in the State of Georgia to be entitled and allowed to vote at all such elections without distinction of race or color.

2. This Court has jurisdiction of this action under 42 U.S.C. 1971(d), and under 28 U.S.C. 1345.

3. Defendants James Griggs Raines, Dixon Oxford, and Roscoe Radford are the members of the Board of Registrars of Terrell County Georgia, and defendants F. Lawson Cook, Sr., and Mrs. F. Lawson Cook, Sr., are

Deputy Registrars of Terrell County. The defendants aforesaid held the offices previously mentioned at the time the applications by Negro citizens to register to vote which are involved in this Complaint were made or were pending. In their official capacities the defendants [fol. 4] are and have been responsible for the registering in that county of qualified persons who desire to vote. Defendants are citizens of the United States and of the State of Georgia and while discharging the duties of the offices aforesaid were acting under color of law of the State of Georgia.

4. Defendants kept separate records by race as to applicants for registration, and used differently colored cards for white and Negro applicants and registered voters.

5. In the year 1956 the white citizens of voting age in Terrell County, Georgia, numbered approximately 3,233 and the Negro citizens of voting age approximately 5,036. On or about July 20, 1956, the white citizens registered to vote in Terrell County numbered 2,679 while the Negro citizens registered to vote numbered 48.

In the year 1956 the white citizens of voting age in Georgia numbered approximately 1,559,975 and the Negro citizens of voting age approximately 621,576. In that year, the white citizens registered to vote in Georgia numbered approximately 1,057,513, while the Negro citizens registered to vote numbered approximately 156,880.

6. Under the provisions of the Constitution of the State of Georgia, all citizens of the State qualified as to age and residence and not laboring under any of the disabilities named in said Constitution are entitled to register as electors and to vote in all elections in said State who come within either of the two classes therein provided for, namely (1) all persons who are of good character and understand the duties and obligations of citizenship under a republican form of government; or (2) all persons who can pass a literacy test, that is to say, who can correctly read in the English language any paragraph of the Constitution of the United States or of the State of Georgia and correctly write the same in the English language when read to them by any one of the registrars.

7. Under the provisions of the statutes of the State of Georgia, registration is a prerequisite to voting at any election by the people in the State. The statutes pertaining to registration require as a prerequisite to registration to vote that after an applicant applies for registration he shall pass a literacy test if he seeks to qualify on the basis of literacy, or an examination based [fol. 5] upon certain standard questions if he seeks to qualify on the basis of his good character and his understanding of the duties and obligations of citizenship under a republican form of government.

8. The current provision of said registration statutes applicable to the administration of the literacy test is Section 17(a) of the Georgia Voters' Registration Act of 1958, approved March 25, 1958, the pertinent part of which reads as follows:

> "(a) If the applicant applies for registration and seeks to qualify on the basis of literacy, the Board shall submit to him a section of the Constitution of Georgia or of the United States and the applicant shall be required to read it aloud and write it in the English language. If the applicant reads the section intelligibly and writes it legibly, possesses the other necessary qualifications and is not disqualified for any reason, the card shall be marked approved and the applicant shall be considered a registered voter. Otherwise, the registration card shall be marked rejected."

9. On and after the times defendants assumed their offices, they have engaged and are continuing to engage in acts and practices designed and intended to deny the right to vote to Negro citizens of the United States who are otherwise qualified by law to vote at any election by the people in the State of Georgia and Terrell County, solely on account of their race and color. The acts and practices as hereinafter more fully set forth include arbitrary and discriminatory delay in handling applications of Negroes for registration; the arbitrary refusal to register Negroes who demonstrate themselves to be fully qualified to register; and the discriminatory application of more difficult and more stringent registration

standards to Negro applicants from those applied to white applicants.

Said acts and practices were and are further designed and intended by defendants to perpetuate the disparity referred to in paragraph 5 between the registration of white citizens and Negro citizens in the State of Georgia and in Terrell County.

[fol. 6] 10. During the period beginning in October 1956 and extending to February 1958, a number of Negro citizens of Terrell County, Georgia, applied for registration to vote. Among said Negro citizens were the following, who applied on the dates set forth opposite their names:

	Date Applied
Bertha M. Hall	October 27, 1956
Grace Boyd Gibson	November 3, 1956
Marjorie Moore Turner	November 30, 1956
Alice Bynum	December 7, 1956
James H. Reynolds	December 8, 1956
Manuel J. Hall	March 1, 1957
Alford C. McKenzie	March 22, 1957
Edna M. Lowe	November 19, 1957
Janie Breedlove	November 29, 1957
Eddie G. Lowe	December 3, 1957
Davey Louis Gibson	January 10, 1958
Mary Louise Holloway	January 27, 1958

None of the applications of the foregoing individuals was disposed of until April 7, 1958, which date was set by defendants for all of said Negro applicants to appear to seek qualification to register to vote.

11. In March 1958, while the applications referred to in paragraph 10 hereof were pending, a number of white citizens of Terrell County, Georgia, applied to defendants for registration. All the applications of said white citizens were acted upon and approved in less than two weeks. Among said white citizens were the following, the dates of whose applications to register to vote and of the approvals thereof are set forth opposite their names:

	Date Applied	*Date Registered*
R. G. Webb	March 11, 1958	March 22, 1958
Mrs. Louise Blythe	March 11, 1958	March 22, 1958
Ed M. Laing	March 12, 1958	March 22, 1958
William Lee Wall, Jr.	March 18, 1958	March 22, 1958
Dave W. Oxford	March 19, 1958	March 22, 1958
Mrs. Dave W. Oxford	March 19, 1958	March 22, 1958
G. R. Wright, Jr.	March 20, 1958	March 22, 1958
James C. Laye	March 20, 1958	March 22, 1958
John C. Goodman	March 20, 1958	March 22, 1958
Mrs. J. F. McLendon	March 22, 1958	March 24, 1958
Mary J. Reese	March 22, 1958	March 24, 1958
Jack Laing	March 24, 1958	March 24, 1958
Betty C. Laing	March 24, 1958	March 24, 1958

[fol. 7] 12. On March 25, 1958, the Georgia Voters' Registration Act of 1958 became effective. For applicants who do not elect to qualify on the basis of literacy it contains a more difficult and stringent test than was provided under the previous law. Said test, set forth in Exhibit A hereof, contains a list of 30 questions, 20 of which must be correctly answered. The answers to said questions are not set forth in said law.

Under the previous law of Georgia (the Voters' Registration Act of 1949, as amended), for applicants who did not elect to qualify on the basis of literacy provision was made for a less difficult test. Said test, set forth in Exhibit B hereof, contained a list of 30 questions, only 10 of which had to be correctly answered. The answers to 14 of the questions were set forth in the previous law, which made further provision for distribution by the registrars of all the questions and answers to any members of the public.

13. The aforesaid delay in handling the applications of Negro applicants was not accidental, but was for the purpose of depriving them of their right to vote during the period of delay and thereafter; for the further purpose of subjecting them to the more difficult and stringent test of the Georgia Voters' Registration Act of 1958; and for the further purpose of discouraging them and other Negro citizens from attempting to register.

14. On April 7, 1958, the following Negro citizens of the United States and of Terrell County, Georgia, who at that time possessed and now possess all the qualifications and none of the disqualifications under the Constitution and laws of the State of Georgia to register to vote appeared before defendant board members for the purpose of registering to vote, and elected to take the literacy test. They then and there demonstrated to said defendants their ability to read correctly and intelligibly and stood ready to demonstrate to said defendants but were arbitrarily and without legal cause and solely for racial reasons prevented by said defendants from demonstrating their ability to write correctly and legibly, a provision of the Constitution of the State of Georgia or of the United States:

(a) Edna Mae Lowe, who is a teacher of mathematics at Carver High School, Dawson, Terrell County, Georgia, [fol. 8] and holds a Bachelor of Science degree from Fort Valley State College, Fort Valley, Georgia, and a Master of Arts degree in Education from New York University;

(b) Janie Breedlove, who is an elementary school teacher in Terrell County, Georgia, and holds a Bachelor of Science degree from Albany State College, Albany, Georgia;

(c) Davey Louis Gibson, who is a school teacher in Terrell County, Georgia, and holds a Bachelor of Science degree from Albany State College, Albany, Georgia, and is now working for a Master of Arts degree in Elementary School Administration at New York University;

(d) Grace Boyd Gibson, who has been an elementary school teacher in Calhoun County, Georgia, and holds a Bachelor of Science degree from Albany State College, Albany, Georgia.

15. On April 7, 1958, the following Negro citizen of the United States and of Terrell County, Georgia, who at that time possessed and now possesses all the qualifications and none of the disqualifications under the Constitution and laws of the State of Georgia to register to vote, appeared before defendant board members for the purpose of registering to vote, and elected to take the

literacy test. He then and there demonstrated to said defendants his ability to read correctly and intelligibly and to write correctly and legibly a section of the Constitution of the State of Georgia or of the Unitetd States:

Eddie George Lowe, who attended Tuskegee Institute and who is employed at the United States Marine Corps Supply Center, Albany, Georgia.

16. Notwithstanding the fact that the persons named in the preceding two paragraphs were qualified, and demonstrated or stood ready to demonstrate to defendant board members that they were qualified, to register to vote as aforesaid, they were, on April 7, 1958, arbitrarily and without legal cause and solely for racial reasons, rejected and thus prevented from registering and voting—Eddie Lowe because of alleged inability to write correctly and legibly and the other individuals, named in paragraph 14, because of alleged inability to read correctly and intelligibly.

17. Defendants in the administration of the literacy test provided by the Georgia Constitution and law have applied different and more stringent registration standards to Negro applicants from those they applied to white applicants.

[fol. 9] 18. The application of different standards by defendants as aforesaid was not accidental, but was designed and intended by them to discriminate against Negro applicants on account of their race or color.

19. There are reasonable grounds to believe that defendants and their successors will continue to engage in the acts and practices set forth in this Complaint and in other acts and practices for the purposes set forth in paragraph 9 hereof unless enjoined by this Court.

WHEREFORE, Plaintiff prays this Court that after hearing, this Court issue a preliminary and permanent injunction enjoining the defendants, their agents, employees, successors, and all persons in active concert and participation with them from:

(1) following different procedures in the processing or time of processing of applications of Negro citizens to register to vote from the procedures applied to applications of white citizens to register to vote;

(2) failing or refusing, on the ground that the following persons failed to meet the requirements of the literacy test provided by the law of the State of Georgia, to certify to the appropriate county or state official or agency that the said persons are eligible to register to vote in Terrell County: Eddie George Lowe, Edna Mae Lowe, Janie Breedlove, Davey Louis Gibson, and Grace Boyd Gibson.

(3) applying more stringent standards and criteria in the administration of the literacy test or any other test provided by the Constitution and laws of Georgia to Negro applicants in Terrell County from those standards and criteria applied to white applicants for registration.

(4) engaging in any acts, practices, methods, or procedures which discriminate or tend to discriminate against any applicant for registration because of said applicant's race or color.

Plaintiff also prays this Court for any such further relief that the interest of justice requires or that this Court may direct.

By direction of the Attorney General of the United States

/s/ W. Wilson White
Assistant Attorney General

/s/ Frank O. Evans
United States Attorney

EXTRACTS FROM GEORGIA VOTERS' REGISTRATION ACT APPROVED MARCH 25, 1958

"Section 2. Notwithstanding any other provisions of this law, any person who was qualified and registered to vote in the 1956 general election shall not be required to re-register under the terms of this law unless such person shall have become or becomes disqualified to vote, by reason of having been purged from the list of registered voters or for any other reason whatsoever, in which event such person shall, in order to become registered to vote, reregister under the terms of this law."

"Section 17. When an applicant appears before the Board of Registrars for examination, the Board shall proceed as hereinafter provided.

"(a) If the applicant applies for registration and seeks to qualify on the basis of literacy, the Board shall submit to him a section of the Constitution of Georgia or of the United States and the applicant shall be required to read it aloud and write it in the English language. If the applicant reads the section intelligibly and writes it legibly, possesses the other necessary qualifications and is not disqualified for any reason, the card shall be marked approved and the applicant shall be considered a registered voter. Otherwise, the registration card shall be marked rejected. If the applicant states that solely because of physical disability, he is unable to read or write, the section shall be read to him by any member of the Board and he shall be called upon to give a reasonable interpretation thereof. The interpretation shall be in the applicant's own words, giving words the significance ordinarily attached to them by a layman of average intellect and attainments. If, in the opinion of the Board, the applicant gives such a reasonable interpretation, possesses the other necessary qualifications and is not disqualified for any reason, the card shall be marked approved and the applicant shall be considered a registered voter. Otherwise, the registration card shall be marked rejected.

"(b) If the applicant applied for registration and seeks

to qualify on the basis of his good character and his [fol. 11] understanding of the duties and obligations of citizenship under a republican form of government, he shall be given an examination based upon a standard list of questions as hereinafter provided."

"Section 18. The examination which the registrars shall submit to an applicant who claims the right to register on the basis of good character and understanding of the duties and obligations of citizenship under a republican form of government, shall be based upon a standard list of questions, and the questions on this list and no others shall be submitted to such applicant. In order to ascertain whether an applicant is eligible for qualification as a voter in this classification, the registrars shall orally propound to him the 30 questions on the standardized list set forth thereinafter. If the applicant can give correct answers to 20 of the 30 questions as they are propounded to him, possesses the other necessary qualifications and is not disqualified in any other way, the card shall be marked approved and the applicant shall be considered a registered voter. Otherwise, the registration card shall be marked rejected."

"Section 19. The standard list of questions which shall be propounded to each applicant is as follows:

"1. What is a republican form of government?
"2. What are the names of the three branches of the United States government?
"3. In what State Senatorial District do you live and what are the names of the county or counties in such District?
"4. What is the name of the State Judicial Circuit in which you live and what are the names of the counties or county in such Circuit?
"5. What is the definition of a felony in Georgia?
"6. How many Representatives are there in the Georgia House of Representatives and how does the Constitution of Georgia provide that they be apportioned among the several counties?
"7. What does the Constitution of Georgia prescribe as the qualifications of Representatives in the Georgia House of Representatives,

"8. How does the Constitution of the United States provide that it may be amended?

[fol. 12] "9. Who is the Chief Justice of the Supreme Court of Georgia and who is the Presiding Justice of that court?

"10. Who may grant pardons and paroles in Georgia?

"11. Who is the Solicitor General of the State Judicial Circuit in which you live and who is the Judge of such Circuit? (If such Circuit has more than one Judge, name them all.)

"12. If the Governor of Georgia dies, who exercises the executive power, and if both the Governor and the person who succeeds him die, who exercises the executive power?

"13. (a) What does the Constitution of the United States provide regarding the suspension of the privilege of the writ of Habeas Corpus? (b) What does the Constitution of Georgia provide regarding the suspension of the writ of Habeas Corpus?

"14. What are the names of the persons who occupy the following State offices in Georgia?

(1) Governor
(2) Lieutenant Governor
(3) Secretary of State
(4) Attorney General
(5) Comptroller General
(6) State Treasurer
(7) Commissioner of Agriculture
(8) State School Superintendent
(9) Commissioner of Labor

"15. How many Congressional Districts in Georgia are there and in which one do you live?

"16. What is the term of office of a United States Senator?

"17. What is the term of office of a State Senator?

"18. What is the county site of your county?

"19. How does the Constitution of Georgia provide that a county site may be changed?

"20. What are the qualifications for jury service in Georgia?

"21. What are the names of the persons who occupy the following offices in your county?

(1) Clerk of the Superior Court
(2) Ordinary
(3) Sheriff

[fol. 13] "22. How may a new state be admitted into the Union?

"23. On what day and how often is the general election held in Georgia at which members of the General Assembly of Georgia are elected?

"24. What does the Constitution of the United States provide regarding the right of citizens to vote?

"25. In what Federal Court District do you live?

"26. What are the names of the Federal District Judges of Georgia?

"27. Who are citizens of Georgia?

"28. What is treason against the State of Georgia?

"29. In what body does the Constitution of the United States declare that the legislative powers granted in such Constitution shall be vested?

"30. How many electoral votes does Georgia have in the electoral college?"

"Section 31. • • •

"Any other provision of this law to the contrary, notwithstanding, no challenge as provided in this section shall be valid as to a person who has registered to vote prior to the effective date of this law on the grounds that such person does not come within either of the classes provided in the two subdivisions of Paragraph IV of Section 1 or Article II of the Constitution of Georgia."

[fol. 14-15] EXHIBIT B TO COMPLAINT

EXTRACTS FROM GEORGIA CODE OF 1957 BY TITLE AND SECTION

34-121. Oral examination of applicants on standard questions.—The examination which registrars shall submit to those persons who claim the right to register and vote on the basis of good character and understanding of the duties of citizenship under a republican form of government shall be based upon a standard list of ques-

tions, and the questions on this list and no others shall be submitted to each applicant. In each instance where an applicant in this category is examined, the registrars shall keep a record of the questions submitted and the answers given and file the record thus made with the registration card. In order to ascertain whether an applicant is eligible for qualification as a voter in this classification, the registrars shall orally propound to him the 30 questions on the standardized list set forth in the following section. If the applicant can give factually correct answers to 10 of the 30 questions as they are propounded to him, then the registrars shall enter an order declaring him to be prima facie qualified. If he cannot correctly answer the 10 out of the 30 questions propounded to him, then an order shall be entered rejecting his application. (Acts, 1949, pp. 1204, 1212.)

34-122. Procedure on oral examination; standard list of questions.—The registrars shall procure an ample supply of cards or sheets of paper on which shall be printed the standard list of questions set forth below. One of such cards or sheets of paper shall be used in the oral examination of each applicant who seeks qualification as a voter in the classification set forth in the preceding section. The cards shall show in one column the correct answers to the questions, and the answers of the applicant shall appear in a parallel column, so that each question, the correct answer thereto and the applicant's answer will all appear on the same line. If the answer of the applicant to a given question is correct, this fact may be indicated by a check in the applicant's answer column; if the answer is incorrect, the answer of the applicant should be written in said column. It shall be [fol. 16] the duty of the registrars to see to it that the answers in the column showing the correct answers are revised from time to time so that the correct answers will appear in the appropriate column at the time each applicant is examined. The standard list of questions and the present correct answers thereto and the form to be used under this and the preceding section is as follows:

Standard List of Questions

(To be propounded to those seeking to register and qualify as voters under Article II, Section I, Paragraph IV, Subparagraph I of the Constitution [§ 2-704 (1)].)

Date of Examination.....

Name of Applicant .....

Address of Applicant .....

Questions	Answer	Answer of Applicant
1. Who is President of the United States?	Name Incumbent	
2. What is the term of office of the President of the United States?	Four years	
3. May the President of the United States be legally elected for a second term?	Yes	
4. If the President of the United States dies in office, who succeeds him?	Vice President	
5. How many groups compose the Congress of the United States?	Two—The Senate and House of Representatives	
6. How many United States Senators are there from Georgia?	Two	
7. What is the term of office of a United States Senator?	Six Years	
8. Who are the United States Senators from Georgia?	Name Incumbent	
9. Who is Governor of Georgia?	Name Incumbent	
10. Who is Lieutenant Governor of Georgia?	Name Incumbent	

Questions	Answer	Answer of Applicant
[fol. 17] 11. Who is Chief Justice of the Supreme Court of Georgia?	Name Incumbent	
12. Who is Chief Judge of the Court of Appeals of Georgia?	Name Incumbent	
13. Into what two groups is the General Assembly of Georgia divided?	Senate and House of Representatives	
14. Does each Georgia County have at least one representative in the Georgia House of Representatives?	Yes	
15. Do all Georgia counties have the same number of representatives in the Georgia House of Representatives?	No	
16. In what city are the laws of the United States made?	Washington, D.C.	
17. How old do you have to be to vote in Georgia?	18 years old	
18. What city is the capital of the United States?	Washington, D.C.	
19. How many states are there in the United States?	48	
20. Who is the Commander-in-Chief of the United States Army?	The President of the United States	

(The following questions requiring a different answer according to the localities in which the applicant lives, the registrars in printing this list will insert under the

column headed "Correct Answer" the correct answer to each question.)

Questions	Correct Answer	Answer of Applicant
21. In what Congressional District do you live?		
22. Who represents your Congressional District in the National House of Representatives?		
23. In what State Senatorial District do you live?		
24. Who is the State Senator that represents your Senatorial District?		
25. In what County do you live?		
[fol. 18] 26. Who represents your County in the House of Representatives of Georgia? If there are more than one representative, name them.		
27. What is the name of the County seat of your County?		
28. Who is the Ordinary of your County?		
29. Who is the Judge of the Superior Court of your circuit? If there are more than one, name one additional Judge.		
30. Who is the Solicitor-General of your circuit?		
Total Correct Answers		

The registrars shall keep a reasonable supply of extra copies of the question and answer blanks and distribute them to any member of the public who may request copies. (Acts 1949, pp. 1204, 1213.)

[fols: 19-20] * * *

[fol. 21] IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

(File Endorsement Omitted)

(Title Omitted)

MOTION TO DISMISS UNDER RULE 12 B OF THE FEDERAL RULES OF CIVIL PROCEDURE—Filed Sept. 23, 1958

The defendants move the Court as follows:

(1)

To dismiss the action because the complaint fails to state a claim against the defendants upon which relief can be granted.

(2)

To dismiss the action because it does not affirmatively appear therefrom that the United States of America had any legal right to commence it, or that the United States of America has any legal right to prosecute it.

(3)

To dismiss the action because it does not affirmatively appear therefrom that the defendants have engaged, or there are reasonable grounds to believe that the defendants are about to engage, in any act or practice which would deprive any person of any right or privilege [fol. 22] secured by sub-sections (a) and (b) of Title 42, Section 1971 of the United States Code.

(4)

To dismiss the action on the ground that the Court lacks jurisdiction for that:

(a) In the absence of the Civil Rights Act of 1957, and those portions of it, codified as Title 42, Section 1971 (c) and (d), United States Code,

the United States of America could not possibly have had any right to commence and prosecute this action;

(b) No provision of the Civil Rights Act of 1957 authorizes the United States of America to commence and prosecute this action, for the rule, unchanged by the Civil Rights Act of 1957, is that whether a person, resident of and a citizen of Georgia, is entitled to be registered for the purpose of voting is determined solely by weighing his or her qualifications and disqualifications by standards outlined in the Constitution and Statutes of Georgia, and the question of alleged unconstitutional discrimination in registration cannot be determined by classes or groups of individuals as this action attempts to do, but must be determined as to each individual.

(5)

To dismiss the action on the ground that the Court lacks jurisdiction for that even under the Civil Rights Act of 1957, a suit may not be instituted in the name of the United States for preventive relief to a group or class of persons.

[fol. 23]

(6)

To dismiss the action on the ground that the allegations of the complaint and the applicable law, even if the applicable law plead is constitutional, do not warrant the relief sought.

(7)

To dismiss the action on the ground that it does not seek preventive relief, but seeks with respect to the only persons named therein to have the Court review and reverse past decisions of the Board of Registrars of Terrell County, Georgia, as to the eligibility of the alleged citizens of the United States to register under Georgia registration statutes. Therefore the action is not within the purview of Part IV of the Civil Rights Act of 1957 (42 United States Code, 1971(c)).

(8)

To dismiss the action on the ground that those provisions of Part IV of the Civil Rights Act of 1957, now codified as Sections 1971(c) and (d) of Title 42 of United States Code, are unconstitutional and void, and exceed the legislative powers delegated by the States to the Congress of the United States, in that the aforesaid provisions purport to authorize the institution of an action by the United States of America in the District Courts of the United States, which action is not within the scope of the judicial powers delegated by the States to the United States by the Constitution of the United States, which provides that "the judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made under their Authority . . ."

The proceeding sought to be authorized by the statute aforesaid is not such a case in Law and Equity as was and is contemplated or authorized by the Constitution of the United States.

[fol. 24]

(9)

To dismiss the action because as brought it is not one cognizable by the Courts of the United States under the judicial power delegated by the States to the United States. The action is not a case, in Law or Equity, arising under the Constitution or Laws of the United States, or any treaty made under their authority.

(10)

To dismiss the action because even if Part IV of the Civil Rights Act of 1957 should be held constitutional, even if the actions should be held to be a case, in Law and Equity, arising under the statute, even if the relief sought in the action is held to be within the purview of such action as is authorized by the statute, even if equitable power has been constitutionally delegated to the Court, the Court has the discretionary power to refuse to exercise that equitable power and so interfere with functions which are historically reserved to the States under Article II in Amendment 10 of the Constitution, and this

honorable Court should therefore refuse to entertain the action and grant relief sought.

(11)

To dismiss the action because:

(a) That portion of the Civil Rights Act of 1957 which is now codified as Title 42, Section 1971 (a), is unconstitutional and void, and beyond the powers of Congress to enact, in that it is too comprehensive as an exercise of legislative power under the 15th Amendment to the Constitution of the United States, and no other provision of or Amendment to the Constitution of the United States would authorize Congress to enact that portion of the Civil Rights Act of 1957;

[fol. 25] (b) It is not alleged that any of the defendants are intimidating, threatening, coercing, or attempting to intimidate, threaten or coerce any other person for the purpose of interfering with the right of such other person to vote, or to vote as he may choose, or of causing such other person to vote for or not to vote for, any candidate for the office of President, Vice President, Presidential elector member of the Senate or member of the House of Representatives, delegates or commissioners from the Territories or Possessions, at any general, special or primary election held solely, or in part, for the purpose of selecting or electing any such candidate. Therefore, the Attorney General had not the power under Section 1971 (c) of Title 42 of the United States Code to institute for or in the name of the United States this action or proceeding.

(12)

To dismiss the action because by reason of the allegations in Paragraph 9 of the complaint, and the relief based thereon sought in Paragraph 19 of the complaint, and especially in sub-paragraph (2) of said Paragraph 19, the action is one against the State of Georgia, for-

bidden by the 11th Amendment to the Constitution of the United States which provides that the judicial powers of the United States shall not be construed to extend to any suit in Law or Equity, commenced or prosecuted against any one of the United States.

[fol. 26] (13)

To dismiss the action because Part IV of the Civil Rights Act of 1957 is unconstitutional and void as being contrary to the 10th Amendment to the Constitution of the United States for that in it the Congress of the United States through the Courts of the United States seeks to exercise functions which were reserved to the States under the aforesaid 10th Amendment.

/s/ Charles J. Bloch
520 First National Bank Building
Macon, Georgia

Bloch, Hall, Groover & Hawkins
520 First National Bank Building
Macon, Georgia
Of Counsel

/s/ Ellsworth Hall, Jr.
Macon, Georgia

/s/ Robert L. Russell, Jr.
Winder, Georgia

/s/ Peter Zach Geer
Colquitt, Georgia
Attorneys for Defendants

[fol. 27] * * *

[fol. 28] IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

(File Endorsement Omitted)

(Title Omitted)

ORDER OF THE COURT AS TO DEFENSIVE PLEADINGS—Sept. 29, 1958

It appears to the Court:

1.

That the complaint in this case was filed September 4, 1958 and served September 8, 1958, and therefore defendants have until September 29, 1958 to file defensive pleadings (September 28th being a Sunday) (Rule 6(a));

2.

On September 22, 1958, the defendants filed a motion to dismiss under Rule 12(b), setting up that the complaint failed to state a claim against them upon which relief can be granted, for various reasons therein set out, and upon the further ground that the court lacked jurisdiction, for several reasons therein set out;

3.

No responsive pleading other than the aforesaid motion to dismiss has been filed;

It is, thereupon, Considered, Ordered and Adjudged, that no further responsive pleading or answer need be [fol. 29] filed or served by the defendants until some action has been taken by the court on the motion to dismiss, and if the court should deny the motion or postpone its disposition until the trial on the merits, respon-

sive pleadings shall be served within ten days after notice to the defendants' counsel of the court's action.

This September 29, 1958.

/s/ T. Hoyt Davis
United States Judge

Presented by:

/s/ Charles J. Bloch
Of Counsel for Defendants

[fols. 30-31] * * *

[fol. 32] IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

Civil Action No. 442

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES GRIGGS RAINES, DIXON OXFORD, ROSCOE RADFORD, Registrars of Terrell County, Georgia, F. LAWSON COOK, SR. and MRS. F. LAWSON COOK, SR., Deputy Registrars, Defendants

---

OPINION—Filed: April 16, 1959

Appearances:

For *Government:*

W. WILSON WHITE,
Asst. Attorney General,
Washington, D. C.

FRANK O. EVANS,
United States Attorney, Macon, Ga.

BEN BROOKS,
Attorney, Department of Justice,
Washington, D. C.

For *Defendants:*

BLOCH, HALL, GROOVER & HAWKINS
520-25 First National Bank Bldg.
Macon, Georgia.

CHARLES J. BLOCH and
ELLSWORTH HALL, JR., of counsel.

PETER ZACK GEER,
Colquitt, Georgia.

ROBERT L. RUSSELL, JR.
Winder, Georgia.

[fol. 33] DAVIS, DISTRICT JUDGE:

This is an action instituted by the Attorney General of the United States in the name of and on behalf of the United States under the provisions of the Civil Rights Act of 1957. The complaint is one seeking preventive relief against the alleged deprivation of voting rights of certain named persons on account of their race or color. The action is brought against James Griggs Raines, Dixon Oxford, Roscoe Radford, Registrars of Terrell County, Georgia, F. Lawson Cook, Sr., and Mrs. F. Lawson Cook, Sr., Deputy Registrars of Terrell County, Georgia. It is alleged that these Defendants have engaged in wrongful acts and practices, which will deprive otherwise qualified persons of the right to vote because of their race or color. No attack is made upon any State law, but rather, it is alleged that the wrongful deprivation of voting rights will result from the improper and wrongful administration of the Georgia Registration laws by the named Defendants. It is against [fol. 34] this allegedly wrongful administration of the registration laws that this complaint seeks relief.

The complaint was filed on September 4, 1958. On September 23, 1958, a motion to dismiss said action was filed on behalf of all named Defendants. This motion was set down for hearing in Americus, Georgia, on January 26, 1959. Briefs were subsequently filed by counsel for all parties. Reply briefs and supplemental briefs were likewise filed. The Court has given careful consideration to the pleadings, oral arguments and extensive and exhaustive briefs filed with the Court.

The motion to dismiss is based primarily upon four main grounds. The first is the unconstitutionality of the section authorizing the Attorney General to file this action. This contention is grounded on two arguments. The Defendants argue that the sections involved are not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment to the Constitution of the United States. Secondly, they urge that Congress had no authority to authorize the Attorney General to file a suit of this nature, since it is neither an action in law

or equity. This deals in part with the authority of Congress to authorize the grant of an injunction without regard to exhaustion of other available remedies. The second main ground of the motion to dismiss is the failure of the complaint to state a cause of action under the Civil Rights Act of 1957, even if constitutional. The third ground asserts that the cause should be dismissed [fol. 35] by the Court in the exercise of its sound discretion. Because of the Court's ultimate judgment in this matter and to facilitate clarity of presentation, these grounds will be considered in reverse order.

In the third ground of their motion, the Defendants argue that the Court should exercise its discretion and deny the relief sought, even though it be decided that the Act under which it is brought is constitutional and the complaint states a cause of action under the statute. In support of this ground, it was pointed out that no emergency existed, such as that contemplated by Congress when this Act was enacted. Though a general election was held in Georgia in November, 1958, this complaint did not seek a temporary restraining order, or any other remedy which might have enabled the allegedly wronged parties to vote in that election. It seeks instead to secure an injunction at a time when the next scheduled election is over a year in the future. The Defendants argue that the State can afford the desired remedy prior to any election and that no such emergency exists as would justify this Court's intervention.

While some of the language of the Congressional hearings does indicate that this remedy was primarily designed for emergency use, the wording of the statute imposed no such limitation. This Court cannot so limit the applicability of the statute. Similarly, the failure of the complaint to seek such relief as might have protected the voting rights of the allegedly wronged parties prior to the November election does not impede the oper- [fol. 36] ation of the statute. It may raise some question as to the motive of the litigation, but the Court without hearing any of the evidence would not be disposed to dismiss the proceedings in the exercise of its discretion. It is true that equitable relief may be denied in the exercise of the Court's discretion, but it should be a

discretion informed by evidence. The Court is of the opinion that, based on the complaint alone, it is not in possession of sufficient facts to dismiss the complaint in the exercise of its sound discretion.

The Court next comes to a consideration of the question of whether or not this complaint states a cause of action under the provisions of 42 USC 1971. The complaint alleges that the Defendants, as individuals, acting in the exercise of their state given authority as registrars and deputy registrars of Terrell County, Georgia, engaged in certain acts and practices, designed and intended to deny otherwise qualified persons the right to vote because of their race and color. It is alleged that they delayed handling of Negro applications for registration, arbitrarily refused to register Negroes who demonstrated their qualification to vote, and for purposes of discrimination, applied more difficult and stringent registration standards to Negro applicants than to white applicants.

It is further alleged that registration is a legal prerequisite to voting in Georgia, and that this discrimination in administration of registration procedures was on account of the race of the applicants.

There can be no question but that these allegations [fol. 37] are sufficient to bring the allegedly wrongful conduct of the Defendants within the coverage of 42 USC 1971. Whether that statute be construed as one limited to state action, as argued by the United States, or as extending to purely individual action, as contended by the Defendants, the language of the complaint would state a cause of action. It alleges that these Defendants have engaged in certain acts or practices which will deprive others of their right to vote, when otherwise qualified, without distinction as to race or color. The acts and practices alleged are those of the Defendants while acting (even though wrongfully) in the exercise of state given authority. Thus, under any reading of the statute, the facts alleged make out a cause of action.

So it is, that this is not a case such as Collins v. Hardyman, 341 U. S. 651, where the Court can avoid the question of constitutionality. Having determined that none of the other grounds of the Motion to Dismiss

are valid, the Court now passes to the final and most important point raised by that motion; to-wit, the constitutionality of the Act under which this action is brought.

The first prong of the constitutional attack on the statute questions the authority of Congress to authorize the Attorney General to bring an action in this Court, which is neither an action in law or equity. It is urged that this is not a legal action, seeking as it does injunctive relief. On the other hand, it is argued that it is not an [fol. 38] equitable action, since it violates one of the oldest rules of equity, the unavailability of the injunctive process where other legal remedies are available. The Defendants thus contend that this is neither a suit in law or equity, and that Congress had no right to authorize it. This Court cannot accept this contention.

While a court may question the wisdom of overruling an old and well established maxim of equity, the Court knows of no limitation on the powers of Congress to legislate in this field. The fact that Congress in subsection (d) of Section 1971 provided that the courts shall exercise that jurisdiction "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law", does not change the nature of this action from one in equity. It merely provides that in such an equitable proceeding a certain well established principle shall not be applicable. The Court knows of no limitation on the right of Congress to so legislate. It is well known that the Federal Courts have often refused to act because the complainants had failed to exhaust their other remedies. Peay v. Cox, 190 F. 2nd, 123, 125 (5th Cir.). This rule, however, could hardly be applied where Congress has expressly directed the courts to exercise their jurisdiction without regard to such fact.

The Defendants contend that such a limitation of the court's exercise of their jurisdiction is an invasion by the legislative branch of matters properly committed to the judicial branch and thus violative of the separa- [fol. 39] tion of powers doctrine. The Court is far from convinced as to the soundness of this argument, but has not explored it extensively because it does not seem

necessary, in view of the ultimate disposition of this motion.

This brings us, finally, to what appears to be the most substantial contention of the Defendants; that is, that 42 USC 1971 is not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment and exceeds the jurisdiction of the Congress.

It should be noted at the outset that this action is one brought by the Attorney General in the name of and on behalf of the United States. It is not an action by the allegedly wronged party under the provisions of 42 USC 1983, and differs materially from those cases. In that type of case, the "self executing ban" of the Fifteenth Amendment proscribes certain conduct and Section 1983 provides a remedy therefor, without resort to 42 USC 1971. It was the availability of this "self executing ban" which has heretofore allowed the Supreme Court to apparently by-pass a clear ruling on the constitutionality of Section 1971-(a). Terry v. Adams, 345 U. S. 461, 481.

In the instant case, however, the Attorney General has no standing for the bringing of this action, except the recently enacted provisions of Section 1971. Any right that he has to seek preventive relief, where citizens allegedly have been or are about to be denied their right to vote on account of race, is based on Section 1971(c). Prior to its enactment, such an action could not have [fol. 40] been entertained. Thus, it is that the question of the constitutionality of that Section cannot be sidestepped or by-passed. Due to the wording of sub-section (c) of the statute and the way in which it is tied to subsection (a), the latter must also be given its first really critical examination.

As originally enacted and as it remained on the statute books of this country from 1870 until 1957, the present sub-section (a), (formerly Section 1971 in its entirety), was merely a general statement of principle or of rights, without providing any sanction or remedy for its violation. U. S. v. Reese, 92 U. S. 214; U. S. v. Cruikshank, 92 U. S. 542. For this reason, no action could ever be based upon this section alone. Many actions were filed under Sections 1983 and 1971, relying also on the Fifteenth Amendment. It will be noted that in any suit

filed under Section 1983, there could be no question such as is here presented, since Section 1983 is applicable only to persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." By its unmistakably clear language, Section 1983 did not authorize any action for purely private acts, even though such practices resulted in a person being deprived of the right to vote on account of his race.

This brings into focus the question which is now presented for determination by this Court. Under Section 1971 as passed in 1957, is the Attorney General permitted to institute proceedings for preventive relief, where [fol. 41] the alleged wrongful deprivation is that of a private citizen, not a state officer, not acting under color of any state law, custom or usage?

In considering this question, we must close our mind to the allegations of the complaint in the instant case. The question is, not what the Attorney General has done here, but what Congress has authorized him to do. As was clearly demonstrated in the case of United States v. Reese, et. al., 92 U. S. 214, where a statute is enacted in general terms sufficiently broad to apply to wrongful acts, outside as well as within the constitutional jurisdiction of Congress, such a statute cannot be limited by judicial construction so as to make it operate only on that which Congress might rightfully prohibit. "To limit this statute in the manner now asked would be to make a new law, not to enforce an old one." *Ibid.* It is well to note that the Supreme Court was there considering one section of the Act of 1870, of which Section 1971(a) was a part.

Thus, it is not for this Court to decide whether this particular fish is properly within the net, but whether the net is so large as to catch many fish not properly within it.

It is clear beyond question, that the Fifteenth Amendment to the Constitution relates "solely to action by the United States or by any State, and does not contemplate wrongful individual acts." James v. Bowman, 190 U. S. 127. The statute which is here under consideration, as did the one in the above cited case, "on its face . . . purports to be an exercise of the power granted to

[fol. 42] Congress by the "Fifteenth Amendment. The government of the United States is one of delegated, limited, and enumerated powers. Therefore, every valid act of Congress must find in the Constitution some warrant for its passage." U. S. v. Harris, 106 U. S. 629. The power of Congress to legislate at all upon the subject of voting at State elections rests upon the Fifteenth Amendment. Prior to its enactment there was no constitutional guaranty against discrimination on account of race, color or previous condition of servitude. U. S. v. Reese, et. al., 92 U. S. 214.

Thus, it will be seen that, if Section 1971(c) is constitutional, it is because of the power given Congress by the Fifteenth Amendment. As stated, that Amendment relates solely to action by the United States or by any State and does not contemplate wrongful individual acts. The Court is mindful, of course, of the cases holding that a state acts through its lawfully constituted officials and that action by one exercising his state given authority (even though wrongly exercising it) constitutes state action. Thus, for present purposes, it will be assumed that the Fifteenth Amendment authorizes Congress, by appropriate legislation, to prohibit and punish deprivation of voting privileges on account of race or color by any State or by the officers of any State while in the exercise of state given authority. It does not, however, authorize Congress to prohibit or punish purely individual and private action depriving another of his right to vote on account of his race or color.

[fol. 43] This brings us to the meat of the controversy here: What does Section 1971(c) seek to do? Is it limited to state action, as previously defined, or is it sufficiently broad to encompass wrongful action by individuals?

In determining the scope of Section 1971(c), the Court must first consider the language of that section. Is there any limitation within the section itself? The section, as enacted in 1957, reads, as follows:

> "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege

secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person."

42 U. S. C. 1971 (c)

It will be noted at the outset that the section itself includes no limitation as to the persons subject to suit under it. It includes *any person* engaging in or about to engage in a certain type of conduct. By its own terms the section is applicable to any person engaging in the type of action described therein. Thus, it follows that the only limitation, if any there be, must come from the act or practice described therein. In other words, any person capable of engaging in the type of act or practice described would be subject to suit by the Attorney General. If any person other than one clothed with state authority can engage in such act or practice, then the section is broad enough to allow suit against him and is [fol. 44] not limited to state action. It will be particularly noted that the section makes no reference to color of law, a phrase with which the Congress is very familiar, having used it in other sections of this, as well as other Civil Rights Acts. More will be said about this later.

Now, what is the proscribed act or practice which brings this section into play? It is not any act or practice which would deprive another of his rights under the Fifteenth Amendment. If that were the language, there could be no doubt about its limitation to state action, since a private citizen acting individually cannot deprive another of his rights under the Fifteenth Amendment. As argued in James v. Bowman, 190 U. S. 127, 135, a statute in such general language aimed only at such acts as deprived another of whatever rights he had under the Fifteenth Amendment, could not be unconstitutional. It would just be up to the Courts then to determine in each case whether or not the statute applied to the conduct alleged in the complaint. The statute itself would proscribe only that which violated the Amendment. Any

set of facts falling short of a violation of the Amendment would not state a cause of action under the statute.

Here, however, Congress did not so limit the statute. The action proscribed therein is "any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section." Again we come to the question: Can any person other than one clothed with the authority of the State [fol. 45] engage in such an act or practice? To properly determine that, we must first determine what rights and privileges are secured by subsection (a) of Section 1971. (All parties concede that subsection (b) is not here involved).

Subsection (a) of 42 USC 1971 was originally passed in 1870, as a part of what was known as the Enforcement Act, consisting of 23 sections. It was enacted soon after the adoption of the 14th and 15th Amendments. It was in some respects a sort of preamble to the Enforcement Act, in that it merely stated a right or privilege, while the sections that followed it sought to establish remedies for specific violations of civil rights. The section, as originally enacted, was re-enacted in 1957 as subsection (a) of Section 1971. Theretofore it had been the entire section.

The subsection reads, as follows:

> "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." 42 U. S. C. 1971 (a).

Now, what is the right or privilege secured by this subsection? In this Court's opinion, it is the right and privilege of all persons otherwise qualified to vote to be entitled and allowed to vote, without distinction of race or color and to effectuate this right all state constitu- [fol. 46] tional provisions, laws, customs, usages and regulations to the contrary are expressly set aside.

But, this right to be entitled and allowed to vote, as stated, is not simply the right to be free of state interference but is the right to be free of interference from any source on account of one's race or color. It may be that the word "entitled", as used, carries with it some idea of state action only, since entitlement to vote can come from the state alone and can be denied only by the state, acting through its officials. Entitlement is a legal status, which can neither be conferred nor denied by a private citizen. But, the phrase "allowed to vote" carries with it no such idea of state action or legal status. It denotes the physical action of voting and it may be interfered with or denied to another by any person, state official or private citizen. A person who is kidnapped at the polls and spirited away has been denied his right to be allowed to vote. One who is prevented from voting through threats or intimidation has been denied his right to be allowed to vote, just as completely as if the poll manager had refused to accept his ballot. It thus appears to this Court that the right secured by this subsection is such a right of which a person can be deprived, by the act or practice of any other person, state official or private citizen.

This view is strengthened by a look at the other provisions of the Enforcement Act of 1870, of which this subsection, verbatim, was the first section. As previously stated, it was a sort of preamble to that Act, in that it [fol. 47] stated general principles while the following sections contained the "teeth".

The Court feels that it is, therefore, proper to consider the fact that in Section Five of the Enforcement Act of 1870, Congress made it a crime for any individual to hinder, control or intimidate others by bribery or threats from exercising their right of suffrage guaranteed by the Fifteenth Amendment. While this section was declared unconstitutional in the case of James v. Bowman, 190 U. S. 127, on the same grounds here urged, and is no longer on the books, it does have some bearing, in that it reflects the thinking of the Congress which originally enacted this legislation. In this Court's opinion, the imposition of a criminal sanction, for purely private and individual action, indicates that the previous

general statement of principle and rights was sufficiently broad to include the right to be free from private as well as state interference.

It is of interest to note that Sections Three, Four and Five of the Act of 1870 have since been declared unconstitutional as in excess of the jurisdiction conferred upon Congress by the Fifteenth Amendment. This, to say the least, waters down considerably any presumption that Congress on this occasion was acting within the scope of its legislative authority. Any such presumption is further weakened by the principle that the Government of the United States, being a government of limited and enumerated powers, every valid act of Congress must find in the Constitution some warrant for its passage. U. S. v. Harris, 106 U. S. 629, 636.

[fol. 48] In carefully scrutinizing this passage, in order to determine whether the right therein declared is limited to the right to be free from state discrimination, the Court is impressed with the reasoning of the dissenting opinion of Justices Burton, Black and Douglas, in the case of Collins v. Hardyman, 341 U. S. 651, 663, 664, wherein it was stated: "The language of the statute refutes the suggestion that action under color of state law is a necessary ingredient of the cause of action which it recognizes. R. S. Sec. 1980(3) speaks of 'two or more persons in any State or Territory' conspiring. That clause is not limited to state officials. Still more obviously, where the section speaks of persons going 'in disguise on the highway . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws', it certainly does not limit its reference to actions of that kind by state officials. When Congress, at this period, did intend to limit comparable civil rights legislation to action under color of state law, it said so in unmistakable terms."

It is the opinion of this Court that this statement applies with equal force to subsections (a) and (c). In 1870, when (a) was first enacted, and in 1957 when (c) was enacted, Congress in other and similar legislation demonstrated its ability to limit such legislation to state officials by the use of clear and unequivocal language. The term "under color of law" was employed in sub-

section (b) of the Act of 1957. Other sections of the Act of 1870 employed the phrase "whenever, by or under the authority of the constitution or laws of any State . . .".

[fol. 49] It is interesting to note, in this connection, that the complaint of the United States in this case defines the rights and privileges secured by subsection (a) of the statute in Paragraph One, in the following language: "the right and privilege of citizens of the United States who are otherwise qualified by law to vote at any election by the people in the State of Georgia to be entitled and allowed to vote at all such elections without distinction of race or color."

This statement of the right secured completely omits any reference to state constitutions, laws, usage, custom or regulations. The right is similarly defined in the majority report of the House Committee which recommended passage of the Act. House Report No. 291, U. S. Code Congr. and Admin. News, 85th Cong., 1st Sess., 1957, p. 1977.

The language of the subsection following the semicolon; to-wit: "any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding", was not intended to qualify and limit all that had gone before it in the section. To so hold would mean that even direct and positive state action of discrimination in voting rights on account of color could not be reached under this statute, unless the state action was based on some constitutional provision, law, custom, usage or regulation. Clearly, this was not intended when the section was reenacted by Congress in 1957. This point is supported by the testimony of Attorney General Brownell during [fol. 50] the House Hearings on the Civil Rights Act of 1957, wherein he stated:

"For example, if you have a registrar of voters who arbitrarily strikes off several thousand names of Negro voters shortly before the deadline for qualification of voters and gives no hearing to them or an inadequate hearing, then I would think that would be a case that would alert the Attorney General under this bill to the need for some injunctive action, which would give those

people their day in court and allow them, like any other citizen, the right of franchise." Hearings of Subcommittee of House on the Civil Rights Act of 1957, Serial No. 1, p. 601.

Clearly, it could not be argued that such conduct by one registrar in contravention of state law was based on any constitutional provision, statute, usage, custom or regulation. An isolated example could hardly be termed a state custom or usage. Congress did not intend to so limit the application of this section. If it was not an absolute limitation as written, it could hardly be reworded by the courts to limit the section to a deprivation of voting rights by state officials only.

It may be argued, and has been, that the reliance on this section over the years proves its constitutionality. In viewing this contention, it must be remembered that this section was in no wise remedial. It was relied upon only in cases brought under remedial statutes, which included the term "under color of statute, ordinance, regulation, custom, or usage, of any State or Territory", and other similar language. When the two sections were construed together, they clearly did not provide any [fol. 51] remedy against private, individual action. Thus, there was no reason for any attack on subsection (a). Now, however, Congress seeks to tie together two sections, neither of which is limited to state action or action by state authority. This it cannot do. When linked with a remedial statute properly limited, subsection (a) is harmless. But, when linked, as here, with a remedial section which uses the phrase "any person", it renders the remedial section beyond the jurisdiction of Congress and unconstitutional.

Subsection (c) creates a remedy against purely private, as distinguished from state, deprivation of voting rights on account of race or color. The fact that the instant case is a suit against state officials cannot alter the scope of the statute. This illustrates the danger of this type of legislation, which danger was recognized as early as the case of United States v. Reese, et. al., 92 U. S. 214. There the Court held: "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general lan-

guage broad enough to cover wrongful acts, without as well as within the constitutional jurisdiction, can be limited by judicial construction, so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is [fol. 52] not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there." It is true that there the Court was dealing with a penal statute. Here we are dealing with a statute authorizing an injunction, violation of which may carry its own penalty. The same principle would seem applicable.[1] When a person is enjoined from violating a statute, he is entitled to know what that statute proscribes, without awaiting the finality of an authoritative court opinion.

As stated in the Reese case, supra: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

That this is exactly what this section seeks to do is demonstrated by the testimony of Attorney General Brownell in the Senate Hearings before the Subcommittee on Constitutional Rights while considering the Civil Rights Act of 1957. On Page 25 of those Hearings, Mr. Brownell testified: "These sections 4 and 5" (subsections (c) and (d) of the law as enacted) "are added here as

[1] During the Subcommittee hearings on the Civil Rights Act of 1957, Senator Ervin made the following remark: ". . . if Congress has no power to provide any criminal penalties for those acts under the Constitution because it has no right to legislate in that particular area, it certainly would have no right to enact a civil law."

To which Mr. Brownell replied: "That is correct, and we are not asking for it." The difference between the type of remedy provided would not seem to alter the right of Congress to legislate with reference to it. Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, February 14, 1957, p. 25.

[fol. 53] machinery to enforce whatever "the constitutional authority of the Federal Government may be in this area, and does not add to the substantive provisions of the statute."

Again, at page 51, he testified: ". . . our guiding principle will be that only those statutes, parts of statutes that are constitutional, would be enforced by us, and we would not act in any way contrary to a Supreme Court opinion which holds that a statute or any part thereof that is unconstitutional." This indicates that the statute as written is sufficiently broad to include unconstitutional matter, but that the Attorney General expressed his intention of administering it in such a way as to seek no unconstitutional relief. While this is a noteworthy sentiment, the tenure of the Attorney General being what it is, the Courts can hardly rely on his intentions as to the administration of an act which in itself would support the grant of unconstitutional relief, if requested.

The Court has explored this question with particularity, because it is not unmindful in the least of the seriousness of the problem. This Court has never and shall never condone wrongful deprivation of the constitutional rights of any person by a state official or a private citizen. On the other hand, this Court is also sensitive to the dual sovereignty system of government under which we operate and is sincerely devoted to its preservation.

It is this Court's considered opinion that this statute would allow the Attorney General to seek an injunction against a private citizen for an individual act, divorced completely from state action. It is the province of the several states to protect the rights of one citizen against [fol. 54] against the wrongful practices of another person. James v. Bowman, 190 U. S. 127. Congress should not be allowed to extend the authority of the Federal Government into this field. This it has tried to do. The Court is of the opinion that, if Congress intended only to authorize the Attorney General to enjoiin or seek preventive relief against wrongful state action, it could easily have been accomplished, without resort to such confused legislation. Similar, if Congress wishes to leave the court some latitude in determining what may and what may not be enjoined, this may be accomplished

by tying the remedy directly to the Fifteenth Amendment, rather than to another section, the constitutionality of which is far from clear.

For the reasons set forth above, the Court concludes that Section 1971(c) of Title 42 is beyond the jurisdiction of Congress and unconstitutional. It is not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment to the Constitution of the United States. There existing no other basis for an action by the Attorney General in the name of the United States seeking the remedy here sought, the motion to dismiss should be, and the same is hereby, GRANTED.

ORDERED FILED, this the 16 day of April, 1959.

T. Hoyt Davis
T. HOYT DAVIS,
United States District Judge.

[fol. 55] IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA AMERICUS DIVISION

(File Endorsement Omitted)

(Title Omitted)

ORDER DISMISSING COMPLAINT—April 16, 1959

In accordance with the opinion filed in the above stated case on this date, it is hereby ORDERED and ADJUDGED that the complaint in said cause be, and the same is hereby, DISMISSED. Costs are taxed against the United States.

This the 16th day of April, 1959.

T. Hoyt Davis
T. HOYT DAVIS,
United States District Judge.

[fol. 56] (File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT

Notice of Appeal to the Supreme Court of the United States—Filed April 23, 1959

I

Notice is hereby given that the United States of America, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on April 16, 1959.

This appeal is taken pursuant to the provisions of 28 U.S.C. § 1252.

II

The Clerk will please prepare a transcript of the entire record in this cause for transmission to the Clerk of the Supreme Court of the United States.

[fol. 57] III

The following questions are presented by this appeal:

1. Whether 42 U.S.C. 1971(a) and (c) (Supp. V) [P.L. 85-315, Part IV of the Civil Rights Act of 1957, 71 Stat. 637] providing for the institution of civil actions for preventive relief by the Attorney General for or on behalf of the United States is constitutional.

2. Whether 42 U.S.C. 1971(a) and (c) (Supp. V) [P.L. 85-315, Part IV of the Civil Rights Act of 1957, 71 Stat. 637] must be construed to authorize the institution of civil actions by the Attorney General against private persons not acting under color of state law.

s W. Wilson White,
Assistant Attorney General.

s Frank O. Evans,
United States Attorney.

s Ben Brooks,
Attorney, United States Department of Justice,

Attorneys for United States of America, Appellant.

Proof of Service (Omitted in Printing)

[fol. 58] * * *

[fol. 59] (File Endorsement Omitted)

IN THE UNITED STATES DISTRICT COURT

CROSS-APPEAL OF JAMES GRIGGS RAINES, ET AL.—
Filed April 28, 1959

I.

Notice having on April 24, 1959, been given to them by the United States of America of its appeal to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on April 16, 1959, come now James Griggs Raines, Dixon Oxford, Roscoe Radford, Registrars of Terrell County, Georgia, F. Lawson Cook, Sr. and Mrs. F. Lawson Cook, Sr., Deputy Registrars, and file this their notice of cross-appeal as provided by 28 U.S.C. Section 1252.

II.

The following additional questions are presented by this cross-appeal:

1. Whether the Congress of the United States, under the Constitution of the United States, had any authority to authorize the Attorney General of the United States to institute a civil action for preventive relief for or on behalf of the United States of the nature described in 42 United States Code 1971(c), and under the circumstances therein stated;

2. Whether, even if Part IV of the Civil Rights Act of 1957 is constitutional, the complaint in this action states a cause of action under that Act, or a claim upon which the relief sought can be granted;

[fol. 60] 3. Whether, even if Part IV of the Civil Rights Act of 1957 is constitutional, and even if the complaint in this action states a claim upon which the relief sought could be granted, should the action be dismissed by the court in the exercise of its sound discretion;

4. Whether Congress has the right, under the Constitution of the United States, to direct District Courts of the United States to exercise their jurisdiction, and grant preventive relief as to acts with respect to which persons aggrieved had not exhausted their other remedies;

5. Whether the right of citizens of the United States to vote is denied or abridged by a State when voting registrars charged with the duty of administering state laws allegedly design practices of their own, and allegedly arbitrarily refuse to apply the state law;

6. Whether, if the Act is held valid, and the complaint held to state a cause of action, the District Court, in a proceeding under the Act, has the right to direct registrars to certify to the appropriate agency that certain named persons are eligible to register to vote.

/s/ Charles J. Bloch
CHARLES J. BLOCH

/s/ Ellsworth Hall, Jr.
ELLSWORTH HALL, JR.
520 First National Bank Building
Macon, Georgia
Attorneys for Cross-Appellants

PROOF OF SERVICE (Omitted in Printing)

[fol. 61] * * *

[fol. 62] *Clerk's Certificate to Foregoing Transcript Omitted in Printing

[fol. 63] SUPREME COURT OF THE UNITED STATES

No. 914 ——, October Term, 1958

UNITED STATES, APPELLANT

v.

JAMES GRIGGS RAINES, ET AL.

ORDER POSTPONING JURISDICTION—June 29, 1959

APPEAL from the United States District Court for the Middle District of Georgia.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is transferred to the summary calendar.

June 29, 1959

INDEX

	Page
Opinion below	1
Jurisdiction	1
Statute involved	2
Question presented	3
Statement	4
The question is substantial	5
Conclusion	14
Appendix	15

CITATIONS

Cases:	
The Abby Dodge, 223 U.S. 166	13
Alabama State Federation of Labor v. *McAdory*, 325 U.S. 450	8
American Power Co. v. *S.E.C.*, 329 U.S. 90	13
Ashwander v. *T.V.A.*, 297 U.S. 288	8
Baskin v. *Brown*, 174 F. 2d 391	10
Blodgett v. *Holden*, 275 U.S. 142	13
Burton v. *United States*, 196 U.S. 283	8
Chapman v. *King*, 154 F. 2d 460, certiorari denied, 327 U.S. 800	10
Crowell v. *Benson*, 285 U.S. 22	13
Liverpool, N.Y. & P.S. Co. v. *Emigration Commissioners*, 113 U.S. 33	7
Nixon v. *Condon*, 286 U.S. 73	10
N.L.R.B. v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1	13
Panama RR. Co. v. *Johnson*, 264 U.S. 375	13
Reddix v. *Lucky*, 252 F. 2d 930	10
Rescue Army v. *Municipal Court of Los Angeles*, 331 U.S. 549	8
Rice v. *Elmore*, 165 F. 2d 387	10
Smith v. *Allwright*, 321 U.S. 649	10
Terry v. *Adams*, 345 U.S. 461	10
United States v. *C.I.O.*, 335 U.S. 106	13

Cases—Continued

	Page
United States v. *Delaware and Hudson Co.*, 213 U.S. 366	13
United States v. *Dennis*, 183 F. 2d 201, affirmed, *Dennis* v. *United States*, 341 U.S. 494	12
United States v. *Reese*, 92 U.S. 214	12
United States v. *Rumely*, 345 U.S. 41	13
United States v. *U.A.W.*, 352 U.S. 567	8

Constitution and Statute:

U. S. Constitution, Fourteenth Amendment	11, 12
U.S. Constitution, Fifteenth Amendment	1, 5, 6, 9, 10, 11, 12
42 U.S.C. 1971, 16 Stat. 140, as amended, 71 Stat. 634	2, 3, 4, 5, 6, 8, 9, 10, 11, 12

Miscellaneous:

1870 Cong. Globe 2808, 3571	10
103 Cong. Rec. 13138, 16088	12
H. Rep. No. 291, 85th Cong., 1st Sess.	11

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES GRIGGS RAINES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the District Court dismissing the complaint is not yet reported. Its text is set forth in the Appendix, *infra,* pp. 15–34.

JURISDICTION

On April 16, 1959, the District Court for the Middle District of Georgia dismissed the complaint on the ground that 42 U.S.C. 1971 (a), (c), the statute pursuant to which this action was brought, is unconstitutional as beyond the power conferred on Congress by Section 2 of the Fifteenth Amendment to the Constitution of the United States. A notice of appeal to this Court was filed in the District Court on April

23, 1959. The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U.S. C. 1252.

STATUTE INVOLVED

42 U.S.C. 1971, 16 Stat. 140, as amended, 71 Stat. 634, provides in pertinent part that:

> (a) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.
>
> (b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.
>
> (c) Whenever any person has engaged or there are reasonable grounds to believe that any

person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

* * * * *

QUESTION PRESENTED

Subsection (a) of 42 U.S.C. 1971, derived from the Civil Rights Act of 1870, provides that "All citizens of the United States who are otherwise qualified by law to vote at any election * * * shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude * * *." Subsection (c) of 42 U.S.C. 1971, added by the Civil Rights Act of 1957, provides that "Whenever any person has engaged * * * in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute * * * in the name of the United States, a civil action or other proper proceeding for preventive relief * * *."

In the instant action brought by the Attorney General, on behalf of the United States, to restrain defendant state officials from engaging, while acting under color of law, in certain acts and practices alleged to be in violation of 42 U.S.C. 1971(a), the question is whether subsections (a) and (c) are uncon-

stitutional *in toto* because, as construed by the District Court but not by the Government or by any other court, they may permit the Attorney General to seek injunctive relief "against a private citizen for an individual act, divorced completely from state action" (Appendix, *infra*, p. 33).

STATEMENT

On September 4, 1958, the Attorney General, acting for and on behalf of the United States and pursuant to the authority conferred upon him by 42 U.S.C. 1971(c), *supra*, filed a complaint in the United States District Court for the Middle District of Georgia, seeking to enjoin certain designated state officials, the registrars and deputy registrars of voters of Terrell County, Georgia, from refusing, for reasons of race or color, to permit qualified Negro citizens of that county to register to vote; and seeking to enjoin these state officials from engaging in acts and practices which would deprive qualified Negro citizens of that county of the right, secured to them by subsection (a) of section 1971, to be permitted to vote in any election without distinction of race or color. Such acts and practices, as alleged in the complaint, included arbitrary and discriminatory delays in processing applications for registration of Negro citizens; arbitrary refusals to register Negroes who demonstrated themselves to be fully qualified to register to vote under the laws of Georgia; and discriminatory application of more difficult and more stringent registration standards to Negro applicants for registration than the standards applied to white applicants.

The District Court found that the complaint stated a cause of action under the statute, but dismissed the action on the ground that subsection (c) of section 1971, which provides for the enforcement of subsection (a), is unconstitutional.[1] The court held that subsection (c) authorizes the Attorney General to institute civil actions against private individuals as well as against persons acting under color of law, and that its enactment therefore was beyond the power conferred upon Congress by section 2 of the Fifteenth Amendment. Appendix, *infra*, pp. 33–34.

THE QUESTION IS SUBSTANTIAL

The District Court has invalidated important provisions of the civil rights legislation enacted by Congress to protect the right of citizens to vote without distinction of race or color, and to grant clear and specific judicial remedies for vindicating such right. 42 U.S.C. 1971(c) confers an obligation upon the Attorney General of the United States to seek to protect this right—a right which Congress has properly deemed fundamental to the continued existence of representative government.

The validity of 42 U.S.C. 1971 (a) and (c), as applied to action of state officials, has not previously been doubted, and the decision of the District Court holding the statute unconstitutional plainly raises substantial and important questions warranting resolution by this Court.

The holding of the District Court that Congress exceeded its constitutional power in enacting 42 U.S.C.

[1] As appears *infra*, pp. 6, 8–9, the court also in effect held subsection (a) to be unconstitutional.

1971(c) was based on the view that 42 U.S.C. 1971 (a) is a mere declaration of general principle which in terms is broad enough to embrace the protection of the right to vote without distinction of race or color against invasions by private individuals as well as by officials acting under color of law. On this construction of subsection (a), the District Court held that, since subsection (c) permits the Attorney General to bring suit against "any person" who has engaged in any act or practice which would deprive any other person of rights secured by subsection (a), these provisions exceed the authority granted to Congress by section 2 of the Fifteenth Amendment. In reaching this result, the District Court fell into plain error.

1. This suit was one against state officers, not private individuals. The complaint alleged that, at all times pertinent to the complaint, the defendants' violations of 42 U.S.C. 1971(a) were under color of law. The District Court conceded that the complaint stated a cause of action under the statute and that Congress has the power to authorize the Attorney General to bring suits against state officials acting under color of law who engage in practices proscribed by the Fifteenth Amendment. But it then went on to declare that the question was not whether the instant action was a proper one against state officials but whether the Act was broad enough to permit the institution of an improper action, in a hypothetical case, against a private citizen. "* * * [I]t is not for this Court to decide whether this particular fish is properly within the net, but whether the net is so large as to

catch many fish not properly within it." Appendix, *infra,* p. 22.

The question which the District Court stated "is now presented for determination by this Court" was: "Under Section 1971 as passed in 1957, is the Attorney General permitted to institute proceedings for preventive relief, where the alleged wrongful deprivation is that of a private citizen, not a state officer, not acting under color of any state law, custom or usage?" The court went on to say: "In considering this question, we must close our mind to the allegations of the complaint in the instant case." Appendix, *infra,* pp. 21–22.

This is not the correct judicial approach when the constitutionality of an Act of Congress is drawn in issue. It is a primary obligation of the courts to determine the constitutionality of a statute within the actual context of the facts involved. It is not the function of the courts to conjure up remote, hypothetical situations to which the statute conceivably might be applied—and if so applied, might be unconstitutional. As this Court said in *Liverpool, N.Y. & P.S. Co.* v. *Emigration Commissioners,* 113 U.S. 33, 39:

> [The Court] has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversy. In the exercise of that jurisdiction, it is bound * * * one, never to anticipate a question of constitutional law in advance of

> the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

See also *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450, 461; *Burton* v. *United States,* 196 U.S. 283, 295; *United States* v. *U.A.W.,* 352 U.S. 567, 590–591; *Ashwander* v. *T.V.A.,* 297 U.S. 288, 346–347 (Brandeis, *J.,* concurring); *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U.S. 549, 570.

The court below disregarded this axiomatic rule of federal constitutional law by construing, and passing on the validity of, the statute as if it were being applied to a nonexistent, hypothetical set of facts. The constitutional question considered by the court was not presented to it for decision by the record of this case. Its sweeping adjudication of unconstitutionality was thus not only patently erroneous but entirely gratuitous.

2. The Act, properly construed, applies only to state officials acting under color of law, and is clearly and unquestionably constitutional. Section 1971(c) provides that "Whenever any person has engaged * * * in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) * * * the Attorney General may institute * * * a civil action * * *." The District Court correctly concluded that "any person" in subsection (c) means a person who is capable of engaging in the type of act or practice described in subsection (a). In other words, if subsection (a) is restricted, as we think it clearly must

be, to persons acting under color of law, then subsection (c) is also so limited.[2]

42 U.S.C. 1971(a), after declaring that all citizens shall be allowed to vote without distinction of race, provides that such right exists, "any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." This clause plainly indicates that subsection (a) is concerned with the action of states or persons acting under the authority of the state. The further language, that "all citizens * * * who are otherwise qualified by law" to vote shall be allowed to do so without distinction of race, likewise confirms that this subsection was intended to prohibit states and other persons acting under state authority from using race as a basis for disqualifying citizens from voting. Clearly, as the District Court itself acknowledged, the statute on its face purports to be an exercise of the power granted to Congress by the Fifteenth Amendment, Appendix, *infra,* p. 22.

The question then arises whether the District Court was justified in its conclusion that there are compelling reasons why subsection (a) should be construed to mean something other than what it says—when the effect of giving it such other construction is to destroy the statute completely. The legislative history of the Act, its context and its purpose all support the conclusion that any ambiguity

[2] With respect to actions brought to enforce rights arising under subsection (a).

that might possibly exist should be resolved in favor of such construction as would save the Act from alleged constitutional infirmities.

Subsection (a) was first enacted in 1870,[3] two months after the adoption of the Fifteenth Amendment. It clearly was meant to be an implementation of that Amendment (*e.g.*, see 1870 Cong. Globe 2808, 3571) and has been so regarded ever since.

In *Terry* v. *Adams*, 345 U.S. 461, the opinion of Mr. Justice Black stated (at page 468):

> Acting pursuant to the power granted by the second section of the Fifteenth Amendment, Congress in 1870 [enacted section 1971(a)].

And in *Reddix* v. *Lucky*, 252 F. 2d 930 (C.A. 5) the court stated (at page 933):

> Congress has implemented the Fifteenth Amendment, as it is authorized to do by its second paragraph, by the adoption of the Act of May 31, 1870, c. 114, § 1, 16 Stat. 140, formerly codified at 8 U.S.C.A., § 31; now 42 U.S.C.A., § 1971.

See also *Chapman* v. *King*, 154 F.2d 460, 461, 464 (C.A. 5), certiorari denied, 327 U.S. 800.

Moreover, section 1971(a) has frequently been invoked in cases which directly involved and turned on the question of whether the defendants were acting under color of state law [4]—a plain demonstration that

---

[3] Prior to the enactment of the Civil Rights Act of 1957 it constituted all of 42 U.S.C. 1971.

[4] Among such cases are *Terry* v. *Adams*, *supra*; *Smith* v. *Allwright*, 321 U.S. 649; *Nixon* v. *Condon*, 286 U.S. 73; *Chapman* v. *King*, *supra*; *Baskin* v. *Brown*, 174 F.2d 391 (C.A. 4); *Rice* v. *Elmore*, 165 F.2d 387 (C.A. 4).

the federal courts have consistently treated that subsection as limited to state action. The decision of the court below in this case, after 42 U.S.C. 1971(a) has been on the books for 89 years, stands as the first and solitary departure from that otherwise unbroken line of judicial authority.[5]

3. When Congress, in 1957, reenacted section 1971 as subsection (a) of the new section 1971, it was of course well aware of this consistent history of judicial construction. The legislative history clearly reflects the understanding of Congress that this subsection represents an implementation of the Fifteenth and Fourteenth Amendments, and goes no further.

The House Report (H. Rep. No. 291, 85th Cong., 1st Sess.) which accompanied the bill which ultimately became the Civil Rights Act of 1957 quotes as follows from a letter from the Attorney General to the Speaker of the House of Representatives (p. 15):

> The existing civil voting statute (sec. 1971 of title 42, U.S.C.) declares that all citizens who are otherwise qualified to vote at any election (State or Federal) shall be entitled to exercise their vote without distinction of race or color. The statute is limited, however, to deprivations of voting rights by State officers or other persons purporting to act under authority of law * * *.

[5] This deviation from binding precedent cannot be defended on the ground that in the earlier cases statutes other than the present section 1971(c) were used to enforce what is now section 1971(a). For several of the decisions specifically hold that 1971(a)—not the enforcing statute—implements the Fifteenth Amendment.

Throughout the debates it was repeatedly emphasized that subsection (a) was an implementation of the Fourteenth and Fifteenth Amendments. See, for example, the comments of Representative Celler, Chairman of the House Judiciary Committee (103 Cong. Rec. 16088), and Senator Bush (103 Cong. Rec. 13138).

The fact that Congress intended that subsection (a) be limited to state action or action under color of law becomes apparent when it is considered that subsection (b) (*supra,* p. 2), by contrast, which was intended to be applicable to the actions of both state-connected and private individuals, uses the phrase "No person, whether acting under color of law or otherwise * * *." There would have been no reason for Congress to have inserted this phrase except to make clear that that subsection, unlike subsection (a), applies to private, individual action.

4. The court below placed great reliance upon *United States* v. *Reese,* 92 U.S. 214. But that case cannot be regarded as controlling authority for the approach adopted below. As Judge Learned Hand stated in *United States* v. *Dennis,* 183 F. 2d 201, 214 (C.A. 2), affirmed, *Dennis* v. *United States,* 341 U.S. 494:

> Even when there is no "separability" clause of any kind, the doctrine of *United States* v. *Reese,* 92 U.S. 214, 23 L. Ed. 563, does not always apply; the Supreme Court has often limited general words in a statute so as to make it constitutional, although in such cases a court must hazard the inference that Con-

> gress would have enacted the statute in the limited form, if it had known that in its broad scope it would be unconstitutional [footnote citing cases omitted].

This Court has held many times not only that the words of a statute must not be extended if to do so makes the statute unconstitutional, but also that a broadly worded act should be limited if necessary to preserve its constitutionality. *The Abby Dodge,* 223 U.S. 166, 175; *Crowell* v. *Benson,* 285 U.S. 22, 62; *American Power Co.* v. *S.E.C.,* 329 U.S. 90, 107–108. Construction to avoid needless breadth of scope is a prime canon of adjudication (*United States* v. *C.I.O.,* 335 U.S. 106, 120–121; *Panama RR. Co.* v. *Johnson,* 264 U.S. 375, 390; *United States* v. *Delaware and Hudson Co.,* 213 U.S. 366, 407–408) because the duty of the courts is to save and not to destroy the statute. *N.L.R.B.* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 30. Words may even be strained, if necessary, to avoid unconstitutionality or serious doubt of constitutionality. *Blodgett* v. *Holden,* 275 U.S. 142, 148; *United States* v. *Rumely,* 345 U.S. 41, 47.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted. As applied here, the statutory provisions are plainly constitutional. In holding to the contrary, on the basis of an unjustifiable construction of the Act as it might possibly be sought to be applied to abstract, hypothetical situations not presented, the District Court fell into gross and manifest error.

Respectfully submitted.

WILLIAM P. ROGERS,
Attorney General.
J. LEE RANKIN,
Solicitor General.
W. WILSON WHITE,
Assistant Attorney General.
HAROLD H. GREENE,
DAVID L. NORMAN,
Attorneys.

MAY 1959.

APPENDIX

In the District Court of the United States for the Middle District of Georgia, Americus Division

Civil Action No. 442

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES GRIGGS RAINES, DIXON OXFORD, ROSCOE RADFORD, REGISTRARS OF TERRELL COUNTY, GEORGIA, F. LAWSON COOK, SR., AND MRS. F. LAWSON COOK, SR., DEPUTY REGISTRARS, DEFENDANTS

DAVIS, *District Judge:*

This is an action instituted by the Attorney General of the United States in the name of and on behalf of the United States under the provisions of the Civil Rights Act of 1957. The complaint is one seeking preventive relief against the alleged deprivation of voting rights of certain named persons on account of their race or color. The action is brought against James Griggs Raines, Dixon Oxford, Roscoe Radford, Registrars of Terrell County, Georgia, F. Lawson Cook, Sr., and Mrs. F. Lawson Cook, Sr., Deputy Registrars of Terrell County, Georgia. It is alleged that these Defendants have engaged in wrongful acts and practices, which will deprive otherwise qualified persons of the right to vote because of their race or color. No attack is made upon any State law, but rather, it is alleged that the wrongful deprivation of voting rights will result from the improper and wrongful administration of the Georgia Registration laws by the named

Defendants. It is against this allegedly wrongful administration of the registration laws that this complaint seeks relief.

The complaint was filed on September 4, 1958. On September 23, 1958, a motion to dismiss said action was filed on behalf of all named Defendants. This motion was set down for hearing in Americus, Georgia, on January 26, 1959. Briefs were subsequently filed by counsel for all parties. Reply briefs and supplemental briefs were likewise filed. The Court has given careful consideration to the pleadings, oral arguments and extensive and exhaustive briefs filed with the Court.

The motion to dismiss is based primarily upon four main grounds. The first is the unconstitutionality of the section authorizing the Attorney General to file this action. This contention is grounded on two arguments. The Defendants argue that the sections involved are not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment to the Constitution of the United States. Secondly, they urge that Congress had no authority to authorize the Attorney General to file a suit of this nature, since it is neither an action in law or equity. This deals in part with the authority of Congress to authorize the grant of an injunction without regard to exhaustion of other available remedies. The second main ground of the motion to dismiss is the failure of the complaint to state a cause of action under the Civil Rights Act of 1957, even if constitutional. The third ground asserts that the cause should be dismissed by the Court in the exercise of its sound discretion. Because of the Court's ultimate judgment in this matter and to facilitate clarity of presentation, these grounds will be considered in reverse order.

In the third ground of their motion, the Defendants argue that the Court should exercise its discretion and deny the relief sought, even though it be decided that the Act under which it is brought is constitutional and the complaint states a cause of action under the statute. In support of this ground, it was pointed out that no emergency existed, such as that contemplated by Congress when this Act was enacted. Though a general election was held in Georgia in November, 1958, this complaint did not seek a temporary restraining order, or any other remedy which might have enabled the allegedly wronged parties to vote in that election. It seeks instead to secure an injunction at a time when the next scheduled election is over a year in the future. The Defendants argue that the State can afford the desired remedy prior to any election and that no such emergency exists as would justify this Court's intervention.

While some of the language of the Congressional hearings does indicate that this remedy was primarily designed for emergency use, the wording of the statute imposed no such limitation. This Court cannot so limit the applicability of the statute. Similarly, the failure of the complaint to seek such relief as might have protected the voting rights of the allegedly wronged parties prior to the November election does not impede the operation of the statute. It may raise some question as to the motive of the litigation, but the Court without hearing any of the evidence would not be disposed to dismiss the proceedings in the exercise of its discretion. It is true that equitable relief may be denied in the exercise of the Court's discretion, but it should be a discretion informed by evidence. The Court is of the opinion that, based on the complaint alone, it is not in possession

of sufficient facts to dismiss the complaint in the exercise of its sound discretion.

The Court next comes to a consideration of the question of whether or not this complaint states a cause of action under the provisions of 42 U.S.C. 1971. The complaint alleges that the Defendants, as individuals, acting in the exercise of their state given authority as registrars and deputy registrars of Terrell County, Georgia, engaged in certain acts and practices, designed and intended to deny otherwise qualified persons the right to vote because of their race and color. It is alleged that they delayed handling of Negro applications for registration, arbitrarily refused to register Negroes who demonstrated their qualification to vote, and for purposes of discrimination, applied more difficult and stringent registration standards to Negro applicants than to white applicants.

It is further alleged that registration is a legal prerequisite to voting in Georgia, and that this discrimination in administration of registration procedures was on account of the race of the applicants.

There can be no question but that these allegations are sufficient to bring the allegedly wrongful conduct of the Defendants within the coverage of 42 USC 1971. Whether that statute be construed as one limited to state action, as argued by the United States, or as extending to purely individual action, as contended by the Defendants, the language of the complaint would state a cause of action. It alleges that these Defendants have engaged in certain acts or practices which will deprive others of their right to vote, when otherwise qualified, without distinction as to race or color. The acts and practices alleged are those of the Defendants while acting (even though wrongfully) in the exercise of state given authority.

Thus, under any reading of the statute, the facts alleged make out a cause of action.

So it is, that this is not a case such as Collins v. Hardyman, 341 U.S. 651, where the Court can avoid the question of constitutionality. Having determined that none of the other grounds of the Motion to Dismiss are valid, the Court now passes to the final and most important point raised by that motion; to-wit, the constitutionality of the Act under which this action is brought.

The first prong of the constitutional attack on the statute questions the authority of Congress to authorize the Attorney General to bring an action in this Court, which is neither an action in law or equity. It is urged that this is not a legal action, seeking as it does injunctive relief. On the other hand, it is argued that it is not an equitable action, since it violates one of the oldest rules of equity, the unavailability of the injunctive process where other legal remedies are available. The Defendants thus contend that this is neither a suit in law or equity, and that Congress had no right to authorize it. This Court cannot accept this contention.

While a court may question the wisdom of overruling an old and well established maxim of equity, the Court knows of no limitation on the powers of Congress to legislate in this field. The fact that Congress in sub-section (d) of Section 1971 provided that the courts shall exercise that jurisdiction "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law", does not change the nature of this action from one in equity. It merely provides that in such an equitable proceeding a certain well established principle shall not be applicable. The Court knows of no limitation on the right of Congress

to so legislate. It is well known that the Federal Courts have often refused to act because the complainants had failed to exhaust their other remedies. *Peay* v. *Cox,* 190 F. 2d, 123, 125 (5th Cir.). This rule, however, could hardly be applied where Congress has expressly directed the courts to exercise their jurisdiction without regard to such fact.

The Defendants contend that such a limitation of the court's exercise of their jurisdiction is an invasion by the legislative branch of matters properly committed to the judicial branch and thus violative of the separation of powers doctrine. The Court is far from convinced as to the soundness of this argument, but has not explored it extensively because it does not seem necessary, in view of the ultimate disposition of this motion.

This brings us, finally, to what appears to be the most substantial contention of the Defendants; that is, that 42 U.S.C. 1971 is not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment and exceeds the jurisdiction of the Congress.

It should be noted at the outset that this action is one brought by the Attorney General in the name of and on behalf of the United States. It is not an action by the allegedly wronged party under the provisions of 42 U.S.C. 1983, and differs materially from those cases. In that type of case, the "self executing ban" of the Fifteenth Amendment proscribes certain conduct and Section 1983 provides a remedy therefor, without resort to 42 U.S.C. 1971. It was the availability of this "self executing ban" which has heretofore allowed the Supreme Court to apparently bypass a clear ruling on the constitutionality of Section 1971–(a). *Terry* v. *Adams,* 345 U.S. 461, 481.

In the instant case, however, the Attorney General has no standing for the bringing of this action, except the recently enacted provisions of Section 1971. Any right that he has to seek preventive relief, where citizens allegedly have been or are about to be denied their right to vote on account of race, is based on Section 1971(c). Prior to its enactment, such an action could not have been entertained. Thus, it is that the question of the constitutionality of that Section cannot be sidestepped or bypassed. Due to the wording of sub-section (c) of the statute and the way in which it is tied to sub-section (a), the latter must also be given its first really critical examination.

As originally enacted and as it remained on the statute books of this country from 1870 until 1957, the present sub-section (a) (formerly Section 1971 in its entirety), was merely a general statement of principle or of rights, without providing any sanction or remedy for its violation. *U.S.* v. *Reese,* 92 U.S. 214; *U.S.* v. *Cruikshank,* 92 U.S. 542. For this reason, no action could ever be based upon this section alone. Many actions were filed under Sections 1983 and 1971, relying also on the Fifteenth Amendment. It will be noted that in any suit filed under Section 1983, there could be no question such as is here presented, since Section 1983 is applicable only to persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." By its unmistakably clear language, Section 1983 did not authorize any action for purely private acts, even though such practice resulted in a person being deprived of the right to vote on account of his race.

This brings into focus the question which is now presented for determination by this Court. Under Section 1971 as passed in 1957, is the Attorney Gen-

eral permitted to institute proceedings for preventive relief, where the alleged wrongful deprivation is that of a private citizen, not a state officer, not acting under color of any state law, custom or usage?

In considering this question, we must close our mind to the allegations of the complaint in the instant case. The question is, not what the Attorney General has done here, but what Congress has authorized him to do. As was clearly demonstrated in the case of *United States* v. *Reese, et. al.*, 92 U.S. 214, where a statute is enacted in general terms sufficiently broad to apply to wrongful acts, outside as well as within the constitutional jurisdiction of Congress, such a statute cannot be limited by judicial construction so as to make it operate only on that which Congress might rightfully prohibit. "To limit this statute in the manner now asked would be to make a new law, not to enforce an old one." *Ibid.* It is well to note that the Supreme Court was there considering one section of the Act of 1870, of which Section 1971(a) was a part.

Thus, it is not for this Court to decide whether this particular fish is properly within the net, but whether the net is so large as to catch many fish not properly within it.

It is clear beyond question, that the Fifteenth Amendment to the Constitution relates "solely to action by the United States or by any State, and does not contemplate wrongful individual acts." *James* v. *Bowman,* 190 U.S. 127. The statute which is here under consideration, as did the one in the above cited case, "on its face * * * purports to be an exercise of the power granted to Congress by the Fifteenth Amendment. The government of the United States is one of delegated, limited, and enumerated powers. Therefore, every valid act of Congress must find in the Constitution some warrant for its passage." *U.S.* v.

Harris, 106 U.S. 629. The power of Congress to legislate at all upon the subject of voting at State elections rests upon the Fifteenth Amendment. Prior to its enactment there was no constitutional guaranty against discrimination on account of race, color or previous condition of servitude. *U.S.* v. *Reese, et al.,* 92 U.S. 214.

Thus, it will be seen that, if Section 1971(c) is constitutional, it is because of the power given Congress by the Fifteenth Amendment. As stated, that Amendment relates solely to action by the United States or by any State and does not contemplate wrongful individual acts. The Court is mindful, of course, of the cases holding that a state acts through its lawfully constituted officials and that action by one exercising his state given authority (even though wrongly exercising it) constitutes state action. Thus, for present purposes, it will be assumed that the Fifteenth Amendment authorizes Congress, by appropriate legislation, to prohibit and punish deprivation of voting privileges on account of race or color by any State or by the officers of any State while in the exercise of state given authority. It does not, however, authorize Congress to prohibit or punish purely individual and private action depriving another of his rights to vote on account of his race or color.

This brings us to the meat of the controversy here: What does Section 1971(c) seek to do? Is it limited to state action, as previously defined, or is it sufficently broad to encompass wrongful action by individuals?

In determining the scope of Section 1971(c), the Court must first consider the language of that section. Is there any limitation within the section itself? The section, as enacted in 1957, reads, as follows:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person. 42 U.S.C. 1971(c)

It will be noted at the outset that the section itself includes no limitation as to the persons subject to suit under it. It includes *any person* engaging in or about to engage in a certain type of conduct. By its own terms the section is applicable to any person engaging in the type of action described herein. Thus, it follows that the only limitation, if any there be, must come from the act or practice described therein. In other words, any person capable of engaging in the type of act or practice described would be subject to suit by the Attorney General. If any person other than one clothed with state authority can engage in such act or practice, then the section is broad enough to allow suit against him and is not limited to state action. It will be particularly noted that the section makes no references to color of law, a phrase with which the Congress is very familiar, having used it in other sections of this, as well as other Civil Rights Acts. More will be said about this later.

Now, what is the proscribed act or practice which brings this section into play? It is not any act or practice which would deprive another of his rights under the Fifteenth Amendment. If that were the language, there could be no doubt about its limita-

tion to state action, since a private citizen acting individually cannot deprive another of his rights under the Fifteenth Amendment. As argued in *James* v. *Bowman,* 190 U.S. 127, 135, a statute in such general language aimed only at such acts as deprived another of whatever rights he had under the Fifteenth Amendment, could not be unconstitutional. It would just be up to the Courts then to determine in each case whether or not the statute applied to the conduct alleged in the complaint. The statute itself would proscribe only that which violated the Amendment. Any set of facts falling short of a violation of the Amendment would not state a cause of action under the statute.

Here, however, Congress did not so limit the statute. The action proscribed therein is "any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section." Again we come to the question: Can any person other than one clothed with the authority of the State engage in such an act or practice? To properly determine that, we must first determine what rights and privileges are secured by subsection (a) of Section 1971. (All parties concede that subsection (b) is not here involved.)

Subsection (a) of 42 U.S.C. 1971 was originally passed in 1870, as a part of what was known as the Enforcement Act, consisting of 23 sections. It was enacted soon after the adoption of the 14th and 15th Amendments. It was in some respects a sort of preamble to the Enforcement Act, in that it merely stated a right or privilege, while the sections that followed it sought to establish remedies for specific violations of civil rights. The section, as originally enacted, was reenacted in 1957 as subsection (a) of Section 1971. Theretofore it had been the entire section.

The subsection reads as follows:

> All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. 42 U.S.C. 1971(a).

Now, what is the right or privilege secured by this subsection? In this Court's opinion, it is the right and privilege of all persons otherwise qualified to vote to be entitled and allowed to vote, without distinction of race or color and to effectuate this right all state constitutional provisions, laws, customs, usages and regulations to the contrary are expressly set aside.

But, this right to be entitled and allowed to vote, as stated, is not simply the right to be free of state interference but is the right to be free of interference from any source on account of one's race or color. It may be that the word "entitled", as used, carries with it some idea of state action only, since entitlement to vote can come from the state alone and can be denied only by the state, acting through its officials. Entitlement is a legal status, which can neither be conferred nor denied by a private citizen. But, the phrase "allowed to vote" carries with it no such idea of state action or legal status. It denotes the physical action of voting and it may be interfered with or denied to another by any person, state official or private citizen. A person who is kidnapped at the polls and spirited away has been denied his right to be allowed to vote. One who is

prevented from voting through threats or intimidation has been denied his right to be allowed to vote, just as completely as if the poll manager had refused to accept his ballot. It thus appears to this Court that the right secured by this subsection is such a right of which a person can be deprived, by the act or practice of any other person, state official or private citizen.

This view is strengthened by a look at the other provisions of the Enforcement Act of 1870, of which this subsection, verbatim, was the first section. As previously stated, it was a sort of preamble to that Act, in that it stated general principles while the following sections contained the "teeth".

The Court feels that it is, therefore, proper to consider the fact that in Section Five of the Enforcement Act of 1870, Congress made it a crime for any individual to hinder, control or intimidate others by bribery or threats from exercising their right of suffrage guaranteed by the Fifteenth Amendment. While this section was declared unconstitutional in the case of *James* v. *Bowman,* 190 U.S. 127, on the same grounds here urged, and is no longer on the books, it does have some bearing, in that it reflects the thinking of the Congress which originally enacted this legislation. In this Court's opinion, the imposition of a criminal sanction, for purely private and individual action, indicates that the previous general statement of principle and rights was sufficiently broad to include the right to be free from private as well as state interference.

It is of interest to note that Sections Three, Four and Five of the Act of 1870 have since been declared unconstitutional as in excess of the jurisdiction conferred upon Congress by the Fifteenth Amendment. This, to say the least, waters down considerably any

presumption that Congress on this occasion was acting within the scope of its legislative authority. Any such presumption is further weakened by the principle that the Government of the United States, being a government of limited and enumerated powers, every valid act of Congress must find in the Constitution some warrant for its passage. *U.S.* v. *Harris*, 106 U.S. 629, 636.

In carefully scrutinizing this passage, in order to determine whether the right therein declared is limited to the right to be free from state discrimination, the Court is impressed with the reasoning of the dissenting opinion of Justices Burton, Black and Douglas, in the case of *Collins* v. *Hardyman*, 341 U.S. 651, 663, 664, wherein it was stated: "The language of the statute refutes the suggestion that action under color of state law is a necessary ingredient of the cause of action which it recognizes. R.S. Sec. 1980(3) speaks of 'two or more persons in any State or Territory' conspiring. That clause is not limited to state officials. Still more obviously, where the section speaks of persons going 'in disguise on the highway * * * for the purpose of depriving * * * any person or class of persons of the equal protection of the laws', it certainly does not limit its reference to actions of that kind by state officials. When Congress, at this period, did intend to limit comparable civil rights legislation to action under color of state law, it said so in unmistakable terms."

It is the opinion of this Court that this statement applies with equal force to subsections (a) and (c). In 1870, when (a) was first enacted, and in 1957 when (c) was enacted, Congress in other and similar legislation demonstrated its ability to limit such legislation to state officials by the use of clear and unequivocal language. The term "under color of law" was em-

ployed in subsection (b) of the Act of 1957. Other sections of the Act of 1870 employed the phrase "whenever, by or under the authority of the constitution or laws of any State * * *".

It is interesting to note, in this connection, that the complaint of the United States in this case defines the rights and privileges secured by subsection (a) of the statute in Paragraph One, in the following language: "the right and privilege of citizens of the United States who are otherwise qualified by law to vote at any election by the people in the State of Georgia to be entitled and allowed to vote at all such elections without distinction of race or color."

This statement of the right secured completely omits any reference to state constitutions, laws, usage, custom or regulations. The right is similarly defined in the majority report of the House Committee which recommended passage of the Act. House Report No. 291, U.S. Code Congr. and Admin. News, 85th Cong., 1st Sess., 1957, p. 197.

The language of the subsection following the semicolon; to-wit: "any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding", was not intended to qualify and limit all that had gone before it in the section. To so hold would mean that even direct and positive state action of discrimination in voting rights on account of color could not be reached under this statute, unless the state action was based on some constitutional provision, law, custom, usage or regulation. Clearly, this was not intended when the section was reenacted by Congress in 1957. This point is supported by the testimony of Attorney General Brownell during the House Hearings on the Civil Rights Act of 1957, wherein he stated:

"For example, if you have a registrar of voters

who arbitrarily strikes off several thousand names of Negro voters shortly before the deadline for qualification of voters and gives no hearing to them or an inadequate hearing, then I would think that would be a case that would alert the Attorney General under this bill to the need for some injunctive action, which would give those people their day in court and allow them, like any other citizen, the right of franchise." Hearings of Subcommittee of House on the Civil Rights Act of 1957, Serial No. 1, p. 601.

Clearly, it could not be argued that such conduct by one registrar in contravention of state law was based on any constitutional provision, statute, usage, custom or regulation. An isolated example could hardly be termed a state custom or usage. Congress did not intend to so limit the application of this section. If it was not an absolute limitation as written, it could hardly be re-worded by the courts to limit the section to a deprivation of voting rights by state officials only.

It may be argued, and has been, that the reliance on this section over the years proves its constitutionality. In viewing this contention, it must be remembered that this section was in no wise remedial. It was relied upon only in cases brought under remedial statutes, which included the term "under color of statute, ordinance, regulation, custom, or usage, of any State or Territory", and other similar language. When the two sections were construed together, they clearly did not provide any remedy against private individual action. Thus, there was no reason for any attack on subsection (a). Now, however, Congress seeks to tie together two sections, neither of which is limited to state action or action by state authority. This it cannot do. When linked with a remedial statute properly limited, subsection

(a) is harmless. But, when linked, as here, with a remedial section which uses the phrase "any person", it renders the remedial section beyond the jurisdiction of Congress and unconstitutional.

Subsection (c) creates a remedy against purely private, as distinguished from state, deprivation of voting rights on account of race or color. The fact that the instant case is a suit against state officials cannot alter the scope of the statute. This illustrates the danger of this type of legislation, which danger was recognized as early as the case of *United States* v. *Reese, et al.*, 92 U.S. 214. There the Court held: "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts, without as well as within the constitutional jurisdiction, can be limited by judicial construction, so as make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there." It is true that there the Court was dealing with a penal statute. Here we are dealing with a statute authorizing an injuction, violation of which may carry its own penalty. The same principle would seem applicable.[1] When a person is enjoined from

[1] During the Subcommittee hearings on the Civil Rights Act of 1957, Senator Ervin made the following remark: "* * * if Congress has no power to provide any criminal penalties for those acts under the Constitution because it has no

violating a statute, he is entitled to know what that statute proscribes, without awaiting the finality of an authoritative court opinion.

As stated in the Reese case, supra: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

That this is exactly what this section seeks to do is demonstrated by the testimony of Attorney General Brownell in the Senate Hearings before the Subcommittee on Constitutional Rights while considering the Civil Rights Act of 1957. On Page 25 of those Hearings, Mr. Brownell testified: "These sections 4 and 5" (subsections (c) and (d) of the law as enacted) "are added here as machinery to enforce whatever the constitutional authority of the Federal Government may be in this area, and does not add to the substantive provisions of the statute."

Again, at page 51, he testified: "* * * our guiding principle will be that only those statutes, parts of statutes that are constitutional, would be enforced by us, and we would not act in any way contrary to a Supreme Court opinion which holds that a statute or any part thereof that is unconstitutional." This indicates that the statute as written is sufficiently broad to include unconstitutional matter, but that the Attorney General expressed his intention of administering it in such a way as to seek no unconstitutional relief.

---

right to legislate in that particular area, it certainly would have no right to enact a civil law."

To which Mr. Brownell replied: "That is correct, and we are not asking for it." The difference between the type of remedy provided would not seem to alter the right of Congress to legislate with reference to it. Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, February 14, 1957, p. 25.

While this is a noteworthy sentiment, the tenure of the Attorney General being what it is, the Courts can hardly rely on his intentions as to the administration of an act which in itself would support the grant of unconstitutional relief, if requested.

The Court has explored this question with particularity, because it is not unmindful in the least of the seriousness of the problem. This Court has never and shall never condone wrongful deprivation of the constitutional rights of any person by a state official or a private citizen. On the other hand, this Court is also sensitive to the dual sovereignty system of government under which we operate and is sincerely devoted to its preservation.

It is this Court's considered opinion that this statute would allow the Attorney General to seek an injunction against a private citizen for an individual act, divorced completely from state action. It is the province of the several states to protect the rights of one citizen against the wrongful practices of another person. *James* v. *Bowman,* 190 U.S. 127. Congress should not be allowed to extend the authority of the Federal Government into this field. This it has tried to do. The Court is of the opinion that, if Congress intended only to authorize the Attorney General to enjoin or seek preventive relief against wrongful state action, it could easily have been accomplished, without resort to such confused legislation. Similar, if Congress wishes to leave the courts some latitude in determining what may and what may not be enjoined, this may be accomplished by tying the remedy directly to the Fifteenth Amendment, rather than to another section, the constitutionality of which is far from clear.

For the reasons set forth above, the Court concludes that Section 1971(c) of Title 42 is beyond the

jurisdiction of Congress and unconstitutional. It is not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment to the Constitution of the United States. There existing no other basis for an action by the Attorney General in the name of the United States seeking the remedy here sought, the motion to dismiss should be, and the same is hereby, GRANTED.

ORDERED FILED, this the 16th day of April, 1959.

T. HOYT DAVIS,
United States District Judge.

In the District Court of the United States for the Middle District of Georgia, Americus Division

Civil Action No. 442

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES GRIGGS RAINES, DIXON OXFORD, ROSCOE RADFORD, REGISTRARS OF TERRELL COUNTY, GEORGIA, F. LAWSON COOK, SR., AND MRS. F. LAWSON COOK, SR., DEPUTY REGISTRARS, DEFENDANTS

Order Dismissing Complaint

In accordance with the opinion filed in the above stated case on this date, it is hereby ORDERED and ADJUDGED that the complaint in said cause be and the same is hereby, DISMISSED. Costs are taxed against the United States.

This the 16th day of April, 1959.

T. HOYT DAVIS,
United States District Judge.

U. S. GOVERNMENT PRINTING OFFICE: 1959

INDEX

	Page
Opinion below	1
Jurisdiction	1
Constitutional provisions and statutes involved	2
Question presented	4
Statement	4
Summary of argument	6
Argument:	
I. The Court has jurisdiction of this appeal	10
II. 42 U.S.C. 1971 (a) and (c) are admittedly constitutional as applied to the facts of this case, and the question of the constitutionality of their application in other hypothetical circumstances should not have been considered by the court below	16
A. The proper scope of judicial review is to determine whether the statute is valid as applied to the facts of the particular case	17
B. Constitutional application of the Act should be upheld as separable from the application deemed unconstitutional	22
III. 42 U.S.C. 1971 (a) and (c) are constitutional	27
A. Introductory	27
B. The language of 42 U.S.C. 1971 indicates that subsections (a) and (c), when taken together, are concerned only with action which can be deemed "State Action"	31
C. Decisions of this court and the lower federal courts have recognized and applied Section 1971(a) as a proper implementation of the Fifteenth Amendment.	35
D. The legislative history of 42 U.S.C. 1971(a) clearly demonstrates that it has, at all times, been intended to apply only to state action	38
1. The legislative history of Section 1971(a) as enacted in 1870 shows that it was intended to implement the Fifteenth Amendment	39

Argument—Continued
III. 42 U.S.C. 1971, etc.—Continued
D. The legislative history, etc.—Continued
2. The legislative history of the Civil Rights Act of 1957 demonstrates that Congress intended by Section 1971(a) when used in conjunction with Section 1971(c) to proscribe only those acts and practices which violate the Fifteenth Amendment ..... Page 45
a. Hearings 46
b. Committee reports 51
c. Floor debate 53
E. 42 U.S.C. 1971 (a) and (c) can and should be construed so as to save rather than to destroy them 55
Conclusion 58

CITATIONS

Cases:

The Abby Dodge, 223 U.S. 166 23
Alpha Portland Cement Co. v. *Knapp*, 230 N.Y. 48 23
Ashwander v. *T.V.A.*, 297 U.S. 288 58
Baskin v. *Brown*, 174 F. 2d 391 ..... 29, 38
Blackmer v. *United States*, 284 U.S. 421 ..... 18, 21, 22
Blodgett v. *Holden*, 275 U.S. 142 57
Burton v. *United States*, 196 U.S. 283 18
Byrd v. *Brice*, 104 F. Supp. 442 29
California Water Service Co. v. *Redding*, 304 U.S. 252 13
Carmichael v. *Southern Coal Co.*, 301 U.S. 495 18
Chapman v. *King*, 154 F. 2d 460, certiorari denied, 327 U.S. 800 38
Coffman v. *Breeze Corporations*, 323 U.S. 316 58
Davis v. *Schnell*, 81 F. Supp. 872, affirmed, 336 U.S. 933 29
Dorchy v. *Kansas*, 264 U.S. 286 23
El Paso & N.E. Ry. Co. v. *Gutierrez*, 215 U.S. 87 26
Employers' Liability Cases, The, 207 U.S. 463 ..... 24, 26
Fleming v. Rhodes, 331 U.S. 100 ..... 12, 18
Garment Workers v. *Donnelly Co.*, 304 U.S. 243 12
Guinn v. *United States*, 238 U.S. 347 ..... 29, 30
Heald v. *District of Columbia*, 259 U.S. 114 19

Cases—Continued

	Page
Hurd v. *Hodge*, 334 U.S. 24	10, 58
Illinois Central Railroad v. *McKendree*, 203 U.S. 514	26
James v. *Bowman*, 190 U.S. 127	28
Jeffrey Mfg. Co. v. *Blagg*, 235 U.S. 571	21
Lee v. *Bickell*, 292 U.S. 415	13
McComb v. *Frank Scerbo & Sons, Inc.*, 177 F. 2d 137	17
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1	23
Nixon v. *Condon*, 286 U.S. 73	38
Ogden v. *Saunders*, 12 Wheat. 213	56
Reddix v. *Lucky*, 252 F. 2d 930	29, 38
Reid v. *Covert*, 351 U.S. 487, decision vacated, 354 U.S. 1	12
Rescue Army v. *Municipal Court*, 331 U.S. 549	58
Rice v. *Elmore*, 165 F. 2d 387, certiorari denied, 333 U.S. 875	29, 38
Screws v. *United States*, 325 U.S. 91	58
Siebold, Ex parte, 100 U.S. 371	30
Smith v. *Allwright*, 321 U.S. 649	29, 38
Steamship Co. v. *Emigration Commissioners*, 113 U.S. 33	18
Sterling v. *Constantin*, 287 U.S. 378	13
Terry v. *Adams*, 345 U.S. 461	8, 29, 30, 35, 36, 37, 38
Thornton v. *Martin*, decided, November 23, 1955 (N.D. Ga.), 1 Race Relations Law Reporter (1956)	29
Trade-Mark Cases, 100 U.S. 82	26
United States v. *Borden Co.*, 308 U.S. 188	16
United States v. *Classic*, 313 U.S. 299	30, 52
United States v. *Dennis*, 183 F. 2d 201, affirmed, *Dennis* v. *United States*, 341 U.S. 494	10, 24
United States v. *Gale*, 109 U.S. 65	30
United States v. *Harriss*, 347 U.S. 612	10, 22, 58
United States v. *Hastings*, 296 U.S. 188	15
United States v. *Petrillo*, 332 U.S. 1	58
United States v. *Reese*, 92 U.S. 214	9, 21, 24, 26, 27, 28
United States v. *Rumely*, 345 U.S. 41	10, 56
United States v. *South-Eastern Underwriters Assn.*, 322 U.S. 533	16
United States v. *Wayne Pump Co.*, 317 U.S. 200	15
United States v. *Williams*, 341 U.S. 70	30
United States v. *Wurzbach*, 280 U.S. 396	20
Virginia Ry. Co. v. *Federation*, 300 U.S. 515	18
Yarbrough, Ex parte, 110 U.S. 651	30
Yazoo and Miss. R.R. v. *Jackson Vinegar Co.*, 226 U.S. 217	19

Constitution and statutes:

United States Constitution: Page

Article I, Sections 2 and 4 54
Article VI 34
Sixth Amendment 21
Fourteenth Amendment 2, 30
Fifteenth Amendment 2, 7, 8, 11, 26, 27, 28, 29, 30, 32, 34, 35, 36, 37, 44, 45, 46, 54, 55
Section 2 ..... 27, 28
Section 6 33
Civil Rights Act of 1957, 71 Stat. 634, Public Law 85-315 ..... 9, 24, 31, 39, 44, 45, 55
Section 131(a) 40
Section 131(b) 40
Criminal Appeals Act, 18 U.S.C. 3731 15
Enforcement Act of May 31, 1870, c. 114, Section 1, 16 Stat. 140 ..... 9, 27, 29, 38, 40, 44
Sections 3 and 4 ..... 25, 27, 28
Federal Corrupt Practices Act, 43 Stat. 1070, *et seq* 20
R.S. 2004 (1874) 29, 40
8 U.S.C. (1946 ed.) 31 ..... 29, 36, 40
8 U.S.C. (1946 ed.) 43 36
8 U.S.C. (1946 ed.) 47 36
18 U.S.C. 241 ..... 28, 30, 33, 48
18 U.S.C. 242 ..... 28, 48
18 U.S.C. 594 ..... 32, 48
18 U.S.C. 602 20
28 U.S.C. 1252 (62 Stat. 928) 2, 6, 11, 13, 14, 15
28 U.S.C. 1291 14
28 U.S.C. 1292 14
42 U.S.C. 1971 (R.S. 2004, as amended, 71 Stat. 637) 3, 29, 31, 40, 48, 55
42 U.S.C. 1971(a) ..... 3, 5, 6, 7, 8, 9, 10, 17, 19, 21, 27, 28, 30, 31-35, 36, 37, 38, 39, 40, 45-48, 51, 52, 53, 54, 55.
42 U.S.C. 1971(b) 3, 29, 31, 32, 33, 45, 52, 53
42 U.S.C. 1971(c) 4, 6, 7, 8, 10, 11, 13, 16, 17, 19, 21, 27, 30, 31, 32, 45, 46, 55
42 U.S.C. 1971(d) 29
42 U.S.C. 1971(e) 29
42 U.S.C. 1982 ..... 10, 58
42 U.S.C. 1983 ..... 28, 35, 36, 37, 38, 52
42 U.S.C. 1985 ..... 28, 36, 37

Miscellaneous:

	Page
89 Cong. Globe 1459	39
90 Cong. Globe 2808	39
91 Cong. Globe 2942	39
91 Cong. Gobe 3479	40
91 Cong. Globe 3480	40
91 Cong. Globe 3485	41
91 Cong. Globe 3560	41
91 Cong. Globe 3571	42
91 Cong. Globe 3611	43
91 Cong. Globe 3655	43
91 Cong. Globe 3661	41, 43
91 Cong. Globe 3663	41
91 Cong. Globe 3666	43
91 Cong. Globe 3670	43
91 Cong. Globe 3671	43
91 Cong. Globe 3679	42
91 Cong. Globe 3684	43
91 Cong. Globe 3690	43
91 Cong. Globe 3752	43
92 Cong. Globe 3872	43
92 Cong. Globe 3882	44
92 Cong. Globe 3915	39
94 Cong. Globe 357	44
94 Cong. Globe 432	44
94 Cong. Rec. 927–928	46
103 Cong. Rec. 8498	54, 55
103 Cong. Rec. 8653	54
103 Cong. Rec. 8705	54
103 Cong. Rec. 8856	54
103 Cong. Rec. 9020	54
103 Cong. Rec. 9396	54
103 Cong. Rec. 10988	54
103 Cong. Rec. 11081	54
103 Cong. Rec. 11475	53
103 Cong. Rec. 11476	53
103 Cong. Rec. 11684	54
103 Cong. Rec. 11697	54
103 Cong. Rec. 11698	54
103 Cong. Rec. 11834	54, 55
103 Cong. Rec. 12149	54
103 Cong. Rec. 12150	54

Miscellaneous—Continued — Page

103 Cong. Rec. 12310 — 54
103 Cong. Rec. 12564 — 54
103 Cong. Rec. 12828 — 54
103 Cong. Rec. 12829 — 54
103 Cong. Rec. 12898 — 54
103 Cong. Rec. 12900 — 54
103 Cong. Rec. 13006 — 54
103 Cong. Rec. 13112 — 54
103 Cong. Rec. 13120 — 54
103 Cong. Rec. 13126 — 54
103 Cong. Rec. 13138 — 54
103 Cong. Rec. 13139 — 55
103 Cong. Rec. 13319 — 54
103 Cong. Rec. 13320 ff — 54
103 Cong. Rec. 13322 — 54
103 Cong. Rec. 13324 — 54
103 Cong. Rec. 13333 — 54
103 Cong. Rec. 13732 — 54
103 Cong. Rec. 13876 — 54, 55
103 Cong. Rec. 13881 — 54
103 Cong. Rec. 16402 — 54
Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 85th Cong., 1st Sess., 1957 House Hearings:
589 — 47
591 — 48
606–607 — 48
656, 659 — 50
681 — 50
738 — 50
808 — 50
903 ff — 50
989 — 50
1173 — 50
1219 — 50
Hearings before the Committee on Rules, House of Representatives, 84th Cong., 2d Sess., on H.R. 627, p. 47 — 46
Hearings before the Committee on Rules, House of Representatives, 85th Cong., 1st Sess., on H.R. 6127 — 49

Miscellaneous—Continued
Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess. — Page 47
1957 Senate Hearings:
1 ff. — 50
2–3 — 47
46 ff. — 50
180 ff. — 50
237 — 50
261 — 50
270 ff. — 50
308 — 50
450 — 50
502 ff. — 50
532 ff. — 50
564–565 — 50
H. Rep. No. 212, 75th Cong., 1st Sess. — 12
H. Rep. No. 2187, 84th Cong., 2d Sess. — 46
H. Rep. No. 291, 85th Cong., 1st Sess. — 9, 51, 52
H.R. 1293, 41st Cong., 2d Sess. — 39
H.R. 4682, 81st Cong., 1st Sess. — 46
H.R. 29, 82d Cong., 1st Sess. — 46
H.R. 5945, 82d Cong., 2d Sess. — 46
H.R. 405, 83d Cong., 1st Sess. — 46
H.R. 627, 84th Cong., 2d Sess. — 46
H.R. 6127, 85th Cong., 1st Sess. — 46
1 Race Relations Law Reporter 213 (1956) — 29
S. 810, introduced April 19, 1870 — 39, 40, 41, 43, 44, 45
S. 1725, 81st Cong., 1st Sess. — 46
S. 907, 84th Cong., 1st Sess. — 46
S. 83, 85th Cong., 1st Sess. — 47, 53
Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76 — 24
To Secure These Rights, The Report of the President's Committee on Civil Rights (1947) — 45

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 64

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES GRIGGS RAINES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 24–40) is reported at 172 F. Supp. 552.

JURISDICTION

The judgment of the District Court was entered on April 16, 1959 (R. 41). The jurisdictional statement was filed on May 12, 1959. On June 29, 1959, this Court entered an order postponing decision of the question of jurisdiction to the hearing on the merits (R. 45). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[1]

[1] The jurisdictional question is discussed at pp. 10–16, *infra*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Fifteenth Amendment to the Constitution of the United States provides that:

> SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

28 U.S.C. 1252 (62 Stat. 928) provides that:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court

of the Virgin Islands and any court of record of Alaska, Hawaii and Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

42 U.S.C. 1971 (R.S. 2004, as amended, 71 Stat. 637) provides in pertinent part that:

(a) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Repre-

sentatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

(c) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

QUESTION PRESENTED

Whether the District Court erred in construing subsections (a) and (c) of 42 U.S.C. 1971 to authorize injunctive suits by the Attorney General with respect to private action depriving citizens of the right to vote, and in holding that, as so construed, the subsections were unconstitutional *in toto*, in a case in which the only action involved was state, not private, action.

STATEMENT

On September 4, 1958, the United States commenced this suit under 42 U.S.C. 1971(c) in the United States District Court for the Middle District of Georgia. The complaint sought to enjoin certain designated state officials, the registrars and deputy

registrars of voters of Terrell County, Georgia, from refusing, for reasons of race or color, to permit qualified Negro citizens of that county to register to vote; and to enjoin these state officials from engaging in acts and practices which would deprive qualified Negro citizens of the right, secured to them by subsection (a) of Section 1971, to be permitted to vote at any election without distinction of race or color. Such acts and practices, the complaint alleged, included arbitrary and discriminatory delays in processing applications for registration of Negro citizens; arbitrary refusals to register Negroes who demonstrated themselves to be fully qualified to register to vote under the laws of Georgia; and discriminatory application of more difficult and more stringent registration standards to Negro applicants for registration than the standards applied to white applicants (R. 1–16).

On September 23, 1958, the defendants filed a motion to dismiss on the ground, among others, that 42 U.S.C. 1971(a) is unconstitutional in that it exceeds the federal power under the Fifteenth Amendment (R. 17–21).

The District Court found that the complaint stated a cause of action under the statute (R. 27), but dismissed the action on the ground that Section 1971(c), in providing for the enforcement of Section 1971(a), is unconstitutional (R. 29–40). The court held that subsection (c) authorizes the Attorney General to institute civil suits to prevent private action as well as action under color of law, and that its enactment, therefore, was beyond the power conferred upon Con-

gress by Section 2 of the Fifteenth Amendment (R. 39–40). The court also held, in effect, that it had no power to limit the language of subsections (a) and (c) by construing them; that it could not separate the valid aspect from the invalid part of subsections (a) and (c); and that subsection (c) was therefore void even when applied to restrain state action (R. 37–40).

SUMMARY OF ARGUMENT

I

This Court has jurisdiction of this appeal under 28 U.S.C. 1252. That section provides for a direct appeal to this Court from a judgment of any court of the United States holding an Act of Congress unconstitutional in any civil action to which the United States is a party. The purpose of Section 1252 is to enable immediate final determination by this Court of the validity of an act of Congress so that, if it is upheld, its enforcement will not be unduly suspended. This appeal comes directly within the language of the section. The District Court explicitly held that 42 U.S.C. 1971(c), when used to enforce 42 U.S.C. 1971(a), is unconstitutional.

Under Section 1252, a direct appeal lies to this Court whenever a district court has decided that a statute is unconstitutional, even if such decision rests on an erroneous construction of the statute. The controlling fact, for purposes of determining whether a direct appeal may be taken, is the holding of unconstitutionality, not the process of reasoning by which that holding is reached. In every case, in varying degrees, statutory construction is a necessary

preliminary step to a determination of constitutionality. This was also true here, but the errors of construction with respect to the meaning of Section 1971(a), and the separability of its applications, on the basis of which the District Court reached the constitutional issue, were specifically not the grounds on which the complaint was dismissed.

II

The District Court held that Section 1971(c), read with (a), is broad enough to permit the Attorney General to institute suits for injunctive relief against private action, as well as against state action, and that it is therefore unconstitutional as beyond the power of Congress under Section 2 of the Fifteenth Amendment.

It was error to have reached the constitutional question because here there was action under color of law, not private action. The question of the applicability of the statute to private action was, therefore, plainly not necessary to the decision. The court should not have considered the question of the constitutionality of the statute as it might hypothetically be applied to a situation not before the court.

The District Court erred, in any event, in holding that 42 U.S.C. 1971 (a) and (c) are unconstitutional *in toto,* inasmuch as those sections are concededly valid as applied to this case, and the valid application of those sections here is clearly separable from allegedly invalid applications in hypothetical situations of private action not here involved.

III

Subsections (a) and (c) of Section 1971 are constitutional. Subsection (a) declares a right, against state action, to be entitled and allowed to vote in any election without distinction of race. By its own terms, subsection (c) applies only where subsection (a) has been violated—it does not, and cannot, broaden the scope of subsection (a).

The language of Section 1971(a) shows that it is concerned only with governmental action and is an implementation of the Fifteenth Amendment. This subsection declares the right to vote without distinction of race, as does the Fifteenth Amendment. It declares the right to be that of "citizens of the United States", again using the terminology of the Fifteenth Amendment. It specifically states that such right exists, any constitution, law, custom, usage or regulation of any state to the contrary notwithstanding. The conclusion that state action alone is reached is further confirmed by contrasting the language of subsection (a) with that of subsection (b) which, by way of distinguishing its coverage from that of subsection (a), makes clear that it applies to all persons "whether acting under color of law or otherwise."

Subsection (a) has been a part of the statutory law for over 89 years and has been invoked and relied on in many cases in the federal courts. This Court, in the recent case of *Terry* v. *Adams*, 345 U.S. 461, gave full effect to this section and held that it was enacted pursuant to the Fifteenth Amendment.

The legislative history of Section 1971(a), both as originally enacted in 1870 and as reenacted in 1957,

demonstrates that it was intended to implement the Fifteenth Amendment.

Section 1971(a) was originally enacted as Section 1 of the Enforcement Act of May 31, 1870. Both opponents and proponents of the measure recognized that its purpose was to implement the Fifteenth Amendment, although there was some dispute as to whether or not that Amendment proscribed private action as well as action taken under color of law.

The legislative history of the Civil Rights Act of 1957 makes it clear that Section 1971(a), as incorporated into the 1957 Act (71 Stat. 634, 637), was intended to apply only to governmental action. For example, the House Report (H. Rep. No. 291, 85th Cong., 1st Sess.), in explaining the meaning of the section, quoted a letter from Attorney General Brownell which specifically stated (p. 15) that Section 1971(a) "is limited, however, to deprivations of voting rights by State officers or other persons purporting to act under authority of law * * *." The same understanding was repeatedly expressed in the hearings, debates, and the committee reports.

The principle is well settled that if an act is capable of alternative constructions only one of which would render the statute invalid, it should be construed so as to save rather than destroy the law. The court below, however, did not follow this rule, relying on *United States* v. *Reese*, 92 U.S. 214, as authority that the courts cannot limit general words of a statute so as to make it constitutional. But that interpreta-

tion of the *Reese* case has been rejected by this Court. See, *e.g., Dennis* v. *United States,* 341 U.S. 494; *United States* v. *Rumely,* 345 U.S. 41; *United States* v. *Harriss,* 347 U.S. 612. In these and other cases, which involved far more serious doubts as to the constitutionality of the acts there invoked than does the statutory provision involved here, this Court limited general words by construing them so as to preserve constitutionality.

The language of Section 1971(a) is similar to that used in 42 U.S.C. 1982. The latter provision was held in *Hurd* v. *Hodge,* 334 U.S. 24, to be applicable only to governmental action. The same construction should have been adopted here.

ARGUMENT

I

THE COURT HAS JURISDICTION OF THIS APPEAL

On motion of the appellees, the District Court entered an order dismissing the complaint before trial. The dismissal was based on a finding that 42 U.S.C. 1971(c), *supra,* p. 4, which was the statutory provision under which the action was brought, is unconstitutional. In holding this provision to be unconstitutional, the District Court based its finding on the relationship of subsection (c) to subsection (a), which it was intended to implement. Before reaching the question of constitutionality the District Court had rejected the arguments that the complaint failed to state a cause of action (R. 27) and that the complaint lacked equity (R. 26–27). On constitutionality, the court overruled the contention that the statute was in-

valid because it failed to require exhaustion of other remedies before an injunction could be sought. Then, on the main issue of whether the statute went beyond the authority granted by the Fifteenth Amendment because it applied to private action, the court held Section 1971(c) unconstitutional, not on the basis of its application in the present case where state action alone was sought to be enjoined, but because in other cases the section, as construed by the court, would proscribe private action and thus would exceed the powers of Congress.

Jurisdiction of this appeal is based on 28 U.S.C. 1252, *supra*, pp. 2–3. That section provides for an appeal to this Court from an interlocutory or final order of any court of the United States holding an act of Congress unconstitutional in any civil action to which the United States is a party. This case, therefore, comes directly within the terms of Section 1252.

The language of 28 U.S.C. 1252 is unqualified. If a court of the United States holds an Act of Congress unconstitutional in a civil action to which the United States is a party, the law provides that any party may appeal to this Court. The purpose of this provision is clear. Congress intended to provide for an immediate and final review by this Court of determinations by lower courts that acts of Congress are unconstitutional, so that the enforcement of such acts will not be needlessly impeded in the event that the decision of the lower court is determined to be incorrect. On the other hand, if an act is found by this Court to be unconstitutional, Congress can then

take appropriate action to remedy the defect, if possible.[2]

In accord with the language and purpose of the law, this Court has accepted jurisdiction whenever the statutory terms have been met and, when it has commented on the section, it has indicated that the statute should be given effect as written. Thus, in *Fleming* v. *Rhodes,* 331 U.S. 100, where the question was whether the right to appeal should be limited to situations where the general application of a statute was involved, the Court upheld its jurisdiction to whatever extent unconstitutionality had been found, saying at page 104:

> To limit the generality of the language of § 2 of the Act of August 24, 1937, to cases that involved only the constitutionality as a whole of the challenged statutes might seriously impair prompt determinations of matters of great public interest. Litigants may challenge the constitutionality of a statute only in so far as it affects them. We hold that jurisdiction of the appeal from the challenged order is conferred upon this Court by 28 U.S.C. § 349a.

And see *Garment Workers* v. *Donnelly Co.,* 304 U.S. 243, 249; *Reid* v. *Covert,* 351 U.S. 487, 490, subsequently vacated on other grounds, 354 U.S. 1.

It is our position that the District Court in this case erred in even reaching a constitutional question involved in an application of the statute which was not in the case before the court and that it also erred in the construction that it gave the statute. But a re-

[2] This purpose is made clear from the legislative history. See H. Rep. No. 212, 75th Cong.; 1st Sess., p. 2.

view of these non-constitutional questions—a review which is necessary in order for this Court to follow its traditional policy of avoiding questions of constitutionality whenever possible—does not detract in any way from the plain fact that the District Court, having disposed of those questions, held 42 U.S.C. 1971(c) unconstitutional as a whole—and that is the crucial fact which gives this Court jurisdiction by way of direct appeal.[3]

Section 1252 provides for a direct appeal to this Court in any case where the *decision* is that an Act of Congress is unconstitutional; it does not provide that such an appeal may not be taken where there is a preliminary issue of statutory construction. It may well be that there is little or no disagreement between the parties as to constitutionality once the problem of construction is resolved; and in that instance the more actively contested question in the District Court may be that of construction. But the decision would still be that an Act of Congress is unconstitutional, and, under the plain language of Section 1252, what governs

[3] An analogy can be drawn with the powers of three-judge courts. Whenever a substantial constitutional question is presented, a three-judge court has jurisdiction and it retains this jurisdiction even if the ultimate decision turns on a non-constitutional issue. *Sterling* v. *Constantin*, 287 U.S. 378; *California Water Service Co.* v. *Redding*, 304 U.S. 252, 255–256. And this Court, too, has direct appellate jurisdiction regardless of the non-constitutional outcome of the case in the three-judge court. *Lee* v. *Bickell*, 292 U.S. 415. By the same reasoning, this Court has jurisdiction under Section 1252 where the District Court's decision was that a statute is unconstitutional, and it retains this jurisdiction to decide the merits even if it turns out that the case can, or must, be decided on a preliminary, non-constitutional ground.

hat a statute is unconstitutional. Any
ld restrict the scope of the jurisdic-
o render it largely ineffectual.
to imagine any case in which the dis-
not have to decide whether on the
utional issue has to be reached and
not adopt some construction of the
to base its findings on constitu-
e decision on these issues requires
ew by a court of appeals, despite the
tute has been held unconstitutional,
ld produce, not promptness in deter-
stitutional questions, but delay and
nder 28 U.S.C. 1291 and 1292, the
s have no jurisdiction in any case
review may be had in the Supreme
f appeal were taken to a court of
urt would have to make an initial
uiry whether a direct appeal would
If an appeal would lie to this Court
g of unconstitutionality did not rest
r contested construction of the stat-
imilar test were to be applied, the
sdiction would become complicated
ll to the detriment of the Congres-
providing prompt and definitive de-
uestions of the constitutionality of

in a case like this, if a lower court
reaching a constitutional question
cues a statute and on the basis of
an act to be unconstitutional, then

the case may come to this Court directly even though a contrary decision on the non-constitutional issues would have required an appeal to a court of appeals (*i.e.*, if the act were held constitutional). Moreover, the initial issue, at least, before this Court in such circumstances is not the constitutional one, but the correctness of the decision on the preliminary matters. But jurisdiction under 28 U.S.C. 1252 cannot depend upon what the District Court should have done, or upon its reasoning in reaching the result of unconstitutionality. To accomplish the purposes of Section 1252, the appellate jurisdiction of this Court must attach once the statute is held unconstitutional, regardless of the grounds on which such holding is based.

This view of the scope to be given Section 1252 is not inconsistent with the limitation on the Court's jurisdiction under the Criminal Appeals Act, 18 U.S.C. 3731. That Act permits direct review where the constitutionality or construction of a statute is the basis for the dismissal of a criminal case, but does not permit appeal where the issue is the construction of the indictment. Under that provision, the Court has refused to accept jurisdiction where an indictment is dismissed on the basis of statutory construction and also on an independent ground of a defect in the pleadings.[4] *United States* v. *Hastings*, 296 U.S. 188; *United States* v. *Wayne Pump Co.*, 317 U.S. 200,

[4] A comparable situation under the Act here in question would occur where a court held that under the Act the complaint failed to state a cause of action *and* that, if it did, it would be unconstitutional.

But where the insufficiency of an indictment is linked with the sufficiency of the charge under a construction of the statute, the Court accepts the appeal on the theory that the basic issue is the construction of the statute rather than the sufficiency of the indictment. *United States* v. *Borden Co.*, 308 U.S. 188, 193; *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533. That situation is comparable to that presented on this appeal.

It may be noted that here the finding of unconstitutionality was not incidental to the order of dismissal; it was not an alternative basis or a dictum, but was the sole ground for the order. The rulings on the preliminary non-constitutional issues did no more than set the stage for the decision on unconstitutionality. And the court specifically and as a necessary step in reaching its order of dismissal held 42 U.S.C. 1971(c) unconstitutional. That holding created the occasion and necessity for a direct appeal to this Court.

II

42 U.S.C. 1971 (a) AND (c) ARE ADMITTEDLY CONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS CASE, AND THE QUESTION OF THE CONSTITUTIONALITY OF THEIR APPLICATION IN OTHER HYPOTHETICAL CIRCUMSTANCES SHOULD NOT HAVE BEEN CONSIDERED BY THE COURT BELOW

The District Court reached the result of unconstitutionality by the use of a method which was erroneous in two respects. The approach employed was this: (1) disregarding the facts of the case, the court tested

the validity of the statute in the abstract and was thus led to the holding that, the act was invalid because it might conceivably be sought to be applied in some hypothetical case in an unconstitutional way; and (2) it held that such a hypothetical invalid application could not be separated from the valid application in this case. The District Court committed error in both of these steps and, therefore, in its conclusion.

A. THE PROPER SCOPE OF JUDICIAL REVIEW IS TO DETERMINE WHETHER THE STATUTE IS VALID AS APPLIED TO THE FACTS OF THE PARTICULAR CASE

> * * * I think it always unwise for a court to cross hypothetical constitutional bridges; crossing actual ones is dangerous enough.[5]

The court below disregarded this admonition when it considered the question of whether 42 U.S.C. 1971 (a) and (c) are unconstitutional in so far as they might forbid private acts depriving citizens of the right to vote. The fact is that the case before the court involved state action, not private action. Nevertheless, the court stated, "* * * we must close our mind to the allegations of the complaint in the instant case" (R. 30), and, "* * * it is not for this Court to decide whether this particular fish is properly within the net, but whether the net is so large as to catch many fish not properly within it" (R. 30). This was plain error.

Judicial review of the constitutionality of acts of Congress has its justification in necessity. It is appropriate only when essential to the decision of the case.

---

[5] Concurring opinion of Judge Frank in *McComb* v. *Frank Scerbo & Sons, Inc.*, 177 F. 2d 137, 141 (C.A. 2).

See, *e.g., Burton* v. *United States,* 196 U.S. 283, 295. From this principle have evolved two fundamental rules of construction, both of which are applicable here, and both of which were disregarded by the District Court: (1) the constitutionality of statutes must not be tested in the abstract, without reference to the application of the statute involved in the case at hand, and (2) litigants may challenge the constitutionality of a statute only in so far as it affects them. *Fleming* v. *Rhodes,* 331 U.S. 100; *Blackmer* v. *United States,* 284 U.S. 421; *Virginia Ry. Co.* v. *Federation,* 300 U.S. 515; *Carmichael* v. *Southern Coal Co.,* 301 U.S. 495.

Accordingly, the nature of the actual controversy in the particular litigation determines the scope and extent of the constitutional issue. The classic formulation of this principle is set forth in *Steamship Co.* v. *Emigration Commissioners,* 113 U.S. 33, 39, as follows:

> * * * It [the Court] has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully.

And, in *Yazoo & Miss. R.R.* v. *Jackson Vinegar Co.*, 226 U.S. 217, 219–220, it was stated:

> * * * Of course, the argument to sustain the contention [of unconstitutionality] is that, if the statute embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto*. But this court must deal with the case in hand and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid.

Had the District Court followed this basic approach, subsections (a) and (c) would have been held to be constitutional. The opinion of the District Court implicitly concedes as much (R. 31).

Equally well settled is the rule that one who is not injured by the allegedly unconstitutional feature of a statute has no standing to challenge constitutionality. As Mr. Justice Brandeis stated for a unanimous Court in *Heald* v. *District of Columbia*, 259 U.S. 114, 123:

> * * * It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him. In no case has it been held that a different rule applies where the statute assailed is an act of Congress; nor has any good reason been suggested why it should be so held [footnote citing cases omitted].

United States v. *Würzbach,* 280 U.S. 396, illustrates the operation of the rule. There, an indictment was brought under the Federal Corrupt Practices Act,[6] charging a representative in Congress with having received money from officers and employees of the United States for the political purpose of promoting his nomination at certain primaries. Upon direct appeal to this Court from an order quashing the indictment, Mr. Justice Holmes, speaking for the Court (280 U.S. at 339), said:

> It is argued at some length that the statute, if extended beyond the political purposes under the control of Congress, is too vague to be valid. The objection to uncertainty concerning the persons embraced need not trouble us now. There is no doubt that the words include representatives, and if there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by someone whom it concerns. * * *

The case at bar is one to which the rule of "standing to challenge" clearly applies. The defendants here are state officials, and it is alleged that, while acting under color of law, they deprived Negroes, solely because of their race, of the right to register to vote (R. 1–4). The District Court permitted the defendants to challenge the validity of the Act on the ground that it might be applied to private action as well as to state action, although these defendants were engaged in state action when they performed the acts alleged in the complaint. Even if subsec-

[6] 43 Stat. 1070, 1073, now codified at 18 U.S.C. 602.

tions (a) and (c) did reach purely private action—which we believe it clear they do not—that fact could not in any way injure the defendants in this case.

The District Court relied upon *United States* v. *Reese,* 92 U.S. 214, in considering the effect of the Act in circumstances not before it. But more recent decisions, in addition to those cited, *supra,* show that, in this aspect of the case, the *Reese* approach has been discarded.

Thus, in *Jeffrey Mfg. Co.* v. *Blagg,* 235 U.S. 571, an action brought under the Ohio Workmen's Compensation Act, the employer argued that the Act violated the Equal Protection Clause in that it arbitrarily gave benefits to employees of businesses having more than four employees and unjustly discriminated against the employees of businesses having four employees or less. The Court stated (at p. 576):

> * * * The argument based upon such discrimination, so far as it affects employees by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. * * *

In *Blackmer* v. *United States,* 284 U.S. 421, the defendant had been convicted and fined for refusing to answer a subpoena to testify as a witness in a criminal trial. In this Court, the defendant argued, among other things, that the act under which the subpoena was issued was unconstitutional under the Sixth Amendment because it excluded defendants in

criminal prosecutions from the right to such a subpoena. This Court stated (at p. 442):

> * * * We need not consider whether the statute requires the construction for which the petitioner contends, as in any event the petitioner, a recalcitrant witness, is not entitled to raise the question. * * *

In *United States* v. *Harriss*, 347 U.S. 612, the Court refused to pass on the constitutionality of the penalty provision of the Lobbying Act when the case came to it on dismissal of the indictment, stating at page 627:

> * * * Unlike §§ 305, 307, and 308 which we have judged on their face, § 310(b) has not yet been applied to the appellees, and it will never be so applied if the appellees are found innocent of the charges against them.

In summary, it is settled both that one not affected by an allegedly unconstitutional provision in a statute may not challenge it and that the courts should consider only issues raised by the facts before them, not hypothetical issues. The District Court erred in not following these elementary rules.

B. CONSTITUTIONAL APPLICATION OF THE ACT SHOULD BE UPHELD AS SEPARABLE FROM THE APPLICATION DEEMED UNCONSTITUTIONAL

Even assuming the District Court did not err in determining that the Act was invalid because it might be applied unconstitutionally in a hypothetical case, its duty to avoid the destruction of an Act of Congress was not at an end. The court had the further duty of determining whether the valid application could be separated from the invalid and thus preserved.

The rule, as laid down by this Court, is that a statute should not be declared invalid as a whole if part is capable of being given effect, despite invalidity of the remainder. This principle was stated by Mr. Justice Brandeis in *Dorchy* v. *Kansas,* 264 U.S. 286, at 289–290 as follows:

> A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad. * * * But a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fail.

See also *The Abby Dodge,* 223 U.S. 166, 175; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 30.[7]

There is in the present case no real issue as to whether the application of the statute is capable of separation with respect to state and private action. Clearly, the court could have construed the act as applicable only to state action, leaving for another day the questions that would arise if it should ever be sought to be enforced against private individuals not acting under color of law.

---

[7] In *People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N.Y. 48 at 60, Judge Cardozo stated "In this state, we have gone far in subdividing statutes, and sustaining them so far as valid * * *. The tendency is, I think, a wholesome one. Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment * * *. The principle of division is not a principle of form. It is a principle of function."

The only question remaining is whether Congress intended it to be so applied, even assuming (which we deny) that the Act covers purely private as well as state action and that the former should be held beyond the power of Congress. The Civil Rights Act of 1957 has no separability clause and the legislative history is silent on the subject. Therefore, the issue of separability must be resolved within the general context, purpose and policy of the Act. *The Employers' Liability Cases,* 207 U.S. 463, 501–502. See Stern, *Separability and Separability Clauses in the Supreme Court,* 51 Harv. L. Rev. 76, 91–101.[8]

In the case of the present legislation, the congressional intent to prohibit interference with voting rights on the basis of race by state officials, regardless of the power to give similar protection from interference by individuals, is undeniable. We shall explore the legislative history of the law at greater length in Point III, *infra,* pp. 38–55; here, a few references will suffice. The court below referred (R. 38–39) to the testimony of Attorney General Brownell on

[8] Judge Learned Hand, speaking for the Court of Appeals in *United States* v. *Dennis,* 183 F. 2d 201, affirmed, *Dennis* v. *United States,* 341 U.S. 494, stated with respect to *Reese* that (183 F. 2d at 214):

"Even when there is no 'separability' clause of any kind, the doctrine of *United States* v. *Reese* * * * does not always apply; the Supreme Court has often limited general words in a statute so as to make it constitutional, although in such cases a court must hazard the inference that Congress would have enacted the statute in the limited form, if it had known that in its broad scope it would be unconstitutional."

the bill that became the Act as follows: " 'These sections 4 and 5' (subsections (c) and (d) of the law as enacted) 'are added here as machinery to enforce whatever the constitutional authority of the Federal Government may be in this area, and [do] not add to the substantive provisions of the statute.' " And again "'* * * our guiding principle will be that only those statutes, parts of statutes that are constitutional, would be enforced by us, and we would not act in any way contrary to a Supreme Court opinion which holds that a statute or any part thereof * * * is unconstitutional.' " As is noted below, *infra,* much of the testimony before the Senate Committee dealt with interference by state officials with the right of Negroes to vote. The report of the House Judiciary Committee and of a subcommittee of the Senate, similarly emphasized the importance of prohibiting state action as such. See, *infra,* pp. 46–53. The floor debates, too, showed the same particularized concern with state action. In short, even if it be assumed here that the proscriptions of the Act went beyond state action, it still cannot be doubted that Congress intended particularly to deal with state action and would have intended that application to stand regardless of the fate of the legislation in other respects.

The court below, relying on *United States* v. *Reese,* 92 U.S. 214, made no attempt to inquire into the purpose or policy of Congress with respect to saving the constitutional application of the Act. In *Reese,* Sections 3 and 4 of the Enforcement Act of 1870 were held invalid *in toto* because these provisions,

which the Court found to have been enacted in an attempt to enforce the Fifteenth Amendment, were not restricted to the deprivation of voting rights because of race or color. It was charged that the defendants in that case had, in fact, deprived Negroes of the right to vote because of their race. The Court, nevertheless, held those sections to be invalid *in toto*.

Distinctions between the statutory provisions involved in the *Reese* case and that involved here could be drawn. For example, the Court there was dealing with a criminal statute; and the requirement of specificity is more rigorously enforced, and properly so, with respect to criminal statutes. But there is no need to distinguish the *Reese* case because, for at least forty years, the approach there taken has not been followed by this Court.[9] See *e.g., El Paso & N.E. Ry Co.* v. *Gutierrez*, 215 U.S. 87, and the cases discussed at pp. 18–22, *supra*, in several of which the Court found that the statute was valid as applied and refused to consider the question of its validity, in hypothetical circumstances, in effect severing one application from the other.

---

[9] During the approximate thirty-year period after the decision in the *Reese* case, the *Reese* approach was followed in a few cases. See, *e.g., Trade-Mark Cases*, 100 U.S. 82; *Illinois Central Railroad* v. *McKendree*, 203 U.S. 514; *The Employers' Liability Cases*, 207 U.S. 463; decided in 1879, 1906 and 1908, respectively. But, since then, it has generally been disregarded.

III

42 U.S.C. 1971 (a) AND (c) ARE CONSTITUTIONAL

A. INTRODUCTORY

The Fifteenth Amendment to the Constitution of the United States became effective on March 30, 1870. It declared that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Section 2 of that Amendment gave Congress the power to enforce the Amendment "by appropriate legislation." Two months later, on May 31, 1870, Congress passed a comprehensive act entitled "An Act to Enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes." (16 Stat. 140.) Section 1 of that Act is now codified as 42 U.S.C. 1971(a) (the full text of which is set forth at p. 3, *supra*) which is the basic provision in controversy in this case.

In 1875, this Court was called upon to consider the validity of Sections 3 and 4 of the Enforcement Act and the scope and meaning of the Fifteenth Amendment. *United States* v. *Reese,* 92 U.S. 214. In discussing the reach of the Amendment this Court stated (at pp. 217–218):

> The Fifteenth Amendment * * * has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise

elective franchise on account of race,
r previous condition of servitude." This,
the express provisions of the second
of the amendment, Congress may en-
y "appropriate legislation."

se case, Sections 3 and 4 of the Act of
), were held to be unconstitutional be-
re not limited in their operation to un-
nination on account of race, color, or
lition of servitude and therefore were
mit of the Fifteenth Amendment.

equent case, *James* v. *Bowman,* 190 U.S.
ourt held that the Fifteenth Amendment
ly to governmental action and that legisla-
orting to be an exercise of the power
Section 2 of the Amendment which pro-
s of private individuals was not "appro-
lation" within the meaning of that

. 1971(a) is the only remaining federal
provision which deals specifically and ex-
with the right to vote without distinction
hough there are other statutory provisions,
nal and civil, which protect constitutional
erally and are broad enough to include this
e judicial history of the Fifteenth Amend-
cases arising under it is, for the most part,
f invalidation of various attempts by states
acting under color of the laws of states, to
se the Negro, either overtly through statutory

. 18 U.S.C. 241 and 242, 43 U.S.C. 1983, and 1985.

enactments,[11] or covertly through discriminatory administration of voting laws,[12] or through discriminatory exclusion of Negroes from participation in the election process.[13]

In 1957, Congress added what appears as subsections (b) through (e) to the section as Section 131 of Civil Rights Act of 1957, 71 Stat. 634. Subsection (b)—which is not involved at all in this case—provided additional prohibitions against interference with the right to vote in federal elections. Subsection (c) authorized the Attorney General, in the name of the United States, to institute civil proceedings to enforce (a) and (b). Subsections (d) and (e), which are also not here involved, make procedural provisions with respect to suits under (c).

The present case is the first brought by the United States under 42 U.S.C. 1971 (a) and (c). It involves alleged racial discrimination by state officials with respect to registration for voting in the State of Georgia. The court below expressly held that subsection (c) is unconstitutional. In doing so, it also implicitly decided that 42 U.S.C. 1971(a) [14] is unconsti-

[11] See *e.g.*, *Guinn* v. *United States*, 238 U.S. 347; *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.), affirmed, 336 U.S. 933.

[12] See *e.g.*, *Reddix* v. *Lucky*, 252 F. 2d 930 (C.A. 5); *Byrd* v. *Brice*, 104 F. Supp. 442 (W.D.La.); *Thornton* v. *Martin*, decided November 23, 1955 (M.D. Ga.), 1 Race Relations Law Reporter 213 (1956).

[13] See *e.g.*, *Terry* v. *Adams*, 345 U.S. 461; *Smith* v. *Allwright*, 321 U.S. 649; *Rice* v. *Elmore*, 165 F. 2d 387 (C.A. 4), certiorari denied, 333 U.S. 875; *Baskin* v. *Brown*, 174 F. 2d 391 (C.A. 4).

[14] Previously 42 U.S.C. 1971; 8 U.S.C. (1946 ed.) 31; R.S. 2004; 16 Stat. 140. For a more detailed history, see *infra*, pp. 38–45. For the sake of clarity, the subsection will generally be referred to by its present designation.

tutional, since the difficulty which the court had with the Act arose not out of subsection (c) as such, but from the fact that this subsection was used to enforce the right secured by subsection (a). The court held that to be constitutionally valid under the Fifteenth Amendment, subsection (c) had to be limited to "state action." By concluding that the right secured by subsection (a) "is such a right of which a person can be deprived, by the act or practice of any other person, state official or private citizen" (R. 34), the court in effect held that subsection (a) could not be squared with the Fifteenth Amendment.[15] From this premise

[15] Although the court did not make explicit its view of the nature of the right secured by subsection (a), it apparently was addressing itself to the right to vote without distinction of race in elections involving only state or local candidates. Section 1971(a), of course, includes the right to vote without distinction of race in federal elections as well. See *Terry* v. *Adams*, 345 U.S. 461, 469. There can be no doubt that Congress has the power to prevent abuses in elections for members of Congress. *United States* v. *Classic*, 313 U.S. 299; *Ex parte Yarbrough*, 110 U.S. 651; *Ex parte Clarke*, 100 U.S. 399; *Ex parte Siebold*, 100 U.S. 371; *United States* v. *Gale*, 109 U.S. 65. And there can be no doubt that citizens of the United States have a federal right, apart from the rights guaranteed by the Fourteenth or Fifteenth Amendments, to vote for members of Congress without discrimination. *Guinn* v. *United States*, 238 U.S. 347. This right can be protected against deprivations by private actions. See *United States* v. *Williams*, 341 U.S. 70, 77 (opinion of Frankfurter, J.). It is to be noted that the *Guinn* case involved what is now Section 1971(a) and that in *Williams*, *Guinn* was cited with approval for the proposition that interference by private action with the right to vote in elections for members of Congress is an offense (under 18 U.S.C. 241). 341 U.S. at 80.

We assume, therefore, that when the court below declared subsections (a) and (c) to be unconstitutional, it had reference to a possible hypothetical application of those subsections to private acts and practices which would deprive others of the

followed the conclusion that subsection (c), insofar as it provided for the enforcement of subsection (a) rights, was invalid. On the other hand, if, as we contend, subsection (a) is not unconstitutional because it applies only to state action, then the assumed invalidity of subsection (c) also falls, for, as the District Court recognized, subsection (c) enforces no more than what is granted as a right by subsection (a).[16]

The court's construction of subsection (a) is erroneous, as is its conclusion with respect to subsection (c). The court disregarded the plain meaning of the language of the statute. It disregarded the decisions of this and the other federal courts; and it disregarded the policy of Congress in enacting this subsection as a part of the Civil Rights Act of 1957.

B. THE LANGUAGE OF 42 U.S.C. 1971 INDICATES THAT SUBSECTIONS (a) AND (c), WHEN TAKEN TOGETHER, ARE CONCERNED ONLY WITH ACTION WHICH CAN BE DEEMED "STATE ACTION"

Section 1971(c) provides that "Whenever any person has engaged * * * in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute * * * a civil action * * *." The District Court correctly concluded that only rights declared in subsection (a) or (b) can be enforced by means of subsection (c). Accordingly, if the right secured by subsection (a) is addressed only to

---

right to vote without distinction of race in state and local, but not federal, elections. Whether, and to what extent, these subsections would be unconstitutional if they actually had such application is, of course, a question that need not be reached in this case.

[16] Except for the here not pertinent enforcement of subsection (b) rights.

deprivations by persons engaged in "state action", then, with respect to its enforcement of subsection (a), subsection (c) is also so limited.

The basic structure of the statute, in the relationship of subsections (a), (b) and (c), clearly indicates that subsection (a) was intended to apply only to state action. Subsection (a) deals with Fifteenth Amendment rights, subsection (b) with the protection of the right to vote in federal elections, and subsection (c) with the enforcement of the two prior subsections. Thus subsection (b), which was intended to reach action by private persons as well as state action interfering with federal elections where federal power did not depend on the Fifteenth Amendment, specified that the prohibited action may be by any "person * * * whether acting under color of law or otherwise".[17] By contrast, subsection (a) makes no reference to any "person" nor does it use the phrase "whether acting under color of law or otherwise." Thus, the language of these two subsections is a clear indication that the first was intended to prohibit state action only.[18]

---

[17] This subsection is clearly patterned on 18 U.S.C. 594, and in fact uses almost the identical language of the criminal statute. However, the clause "whether acting under color of law or otherwise" has been added. Since this clause was not added to change the coverage of the civil remedy from that provided in the criminal statute, it must have been added to differentiate subsection (b) from (a) so far as the acts of private persons are concerned.

[18] The reliance of the court below on the words "any person" in subsection (c) (R. 32) as indicating that action thereunder to enforce (a) was applicable to private persons is not warranted. Subsection (c) implements not only (a) but also (b). Therefore, the reference to "any person" was necessary to reach the private persons covered by (b) and is no indication whatever that (a) was intended to have a like application.

The language in subsection (a), "shall be entitled and allowed to vote * * * without distinction of race," also suggests that subsection (a) is concerned with state action. The word "entitled" in common understanding refers to a legal right or privilege. The word "allowed" ordinarily means permitted, and in the context of this subsection, means not only that the voter shall be entitled by law to vote, but that he shall be permitted to vote without distinction of race by those who carry out election functions. The District Court gave to the word "entitled" its ordinary meaning, "entitlement to vote can come from the state alone" and, "is a legal status, which can neither be conferred nor denied by a private citizen" (R. 34). But the court's construction of the term "allowed," when read in the context of the Act, was most strained. It stated that "[o]ne who is prevented from voting through threats or intimidation has been denied his right to be allowed to vote, just as completely as if the poll manager had refused to accept his ballot" (R. 34). But it is clear that when Congress intended to proscribe acts of intimidation, threats, or coercion, it used those terms, as it did in subsection (b) of the Act, and as it did in Section 6 of the Enforcement Act of 1870 (now 18 U.S.C. 241).

Subsection (a), after declaring that all citizens shall be entitled to vote without distinction of race, provides that this right exists, "any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding." This clause plainly indicates that subsection (a) relates to state action. The entire "not-

withstanding" clause would be superfluous if its purpose was not to incorporate the state action concept. Its only other imaginable purpose—to assure the supremacy of the subsection over state law—is hardly a plausible one, for Article VI of the Constitution accomplishes that purpose so much more directly and effectively that its mere repetition here would have been a redundancy. Congress was legislating against the background of the Civil War and the known reluctance of the states of the former Confederacy to grant the franchise to the liberated former slaves. Patently, it was to assure that those or other states could not in the future discriminate in the electoral process on account of race or color that the "notwithstanding" clause was added to the section.

Subsection (a), when read as a whole, thus leaves no doubt that it is an implementation of the Fifteenth Amendment. The declaration of the right to vote without distinction of race is the heart of the section, as it is with the Amendment. Fifteenth Amendment language is reflected even in the concept that it is "citizens"—rather than persons generally or individuals—whose right to vote is guaranteed. Just as the Fifteenth Amendment incorporates the concept of state action, so does Section 1971(a).

All of these considerations point to these conclusions—that subsection (a), in its application to state and local elections, is only as broad as the Fifteenth Amendment; that it is limited to actions taken under "color of law;" and that it constitutes a valid implementation of the Amendment.

C. DECISIONS OF THIS COURT AND THE LOWER FEDERAL COURTS HAVE RECOGNIZED AND APPLIED SECTION 1971(a) AS A PROPER IMPLEMENTATION OF THE FIFTEENTH AMENDMENT

42 U.S.C. 1971(a) was given full force and effect by this Court in the recent case of *Terry* v. *Adams*, 345 U.S. 461. It was there held that the section was adopted by the Congress "[a]cting pursuant to the power granted by the second section of the Fifteenth Amendment" (345 U.S. at 468). Moreover, the action in that case was sustained on the basis of Section 1971(a) and of the Amendment. The District Court in the instant case declined to follow the *Terry* decision and other similar holdings on the ground that none of the cases was exclusively based upon Section 1971(a), but that, on the contrary, Section 1983—which incorporates the "color of law" concept in its language—was always used in addition to Section 1971(a).[19] From this, the court thought that the decisions upon which the Government relied could not be construed as square holdings that Section 1971(a) incorporates the "state action" concept and hence was constitutional. It is clear that, at least with respect to the *Terry* case, the court plainly erred in this analysis.

In *Terry* certain Negro citizens in Fort Bend County, Texas, had brought a class action against

[19] The court said that "[i]t will be noted that in any suit filed under Section 1983, there could be no question such as is here presented, since Section 1983 is applicable only to persons acting 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.' By its unmistakably clear language, Section 1983 did not authorize any action for purely private acts, even though such practices resulted in a person being deprived of the right to vote on account of his race" (R. 29–30).

officers of the Jaybird Democratic Association alleging that the practices of the Association in refusing to permit Negroes to vote in their privately held pre-primary elections violated the rights of the plaintiffs under the Constitution and laws of the United States. The plaintiffs originally rested their claims on the Fourteenth and Fifteenth Amendments, 42 U.S.C. 1971(a) (then 8 U.S.C. (1946 ed.) 31), 42 U.S.C. 1983 (then 8 U.S.C. (1946 ed.) 43), and 42 U.S.C. 1985 (then 8 U.S.C. (1946 ed.) 47). However, in the course of the proceedings, reliance on Sections 1983 and 1985 was abandoned, and the constitutional amendments and Section 1971(a) remained as the sole basis for the action.[20] Accordingly, this Court, in deciding the case in favor of the plaintiffs, completely disregarded Sections 1983 and 1985 and based its ruling squarely on Section 1971(a) and on the Fifteenth Amendment. This is made clear by specific references in several of the opinions.

The opinion of Mr. Justice Black (in which Mr. Justice Burton and Mr. Justice Douglas joined) refers only to Section 1971(a) as sustaining the cause of action, as follows (345 U.S. at 468–469):

> Acting pursuant to the power granted by the second section of the Fifteenth Amendment, Congress in 1870 provided as follows: [quoting what is now 42 U.S.C. 1971(a)]
>
> The Amendment, *the congressional enactment* and the cases make explicit the rule against racial discrimination in the conduct of elections. Together they show the meaning of

[20] Initially, both damages and injunctive relief were sought, but the plaintiffs subsequently abandoned their prayer for damages.

> "elections." Clearly the Amendment includes any election in which public issues are decided or public officials selected. Just as clearly the Amendment excludes social or business clubs. And *the statute* shows the congressional mandate against discrimination whether the voting on public issues and officials is conducted in community, state or nation. Size is not a standard. [Emphasis added.]

Mr. Justice Frankfurter, in his concurring opinion, after finding that "the State authority has come into play" sufficiently to bring the activity of the Jaybird Association within the meaning of state action, concluded with this statement concerning the relief which could be appropriately granted by a court of equity (345 U.S. at 475, 477):

> * * * What must be done is that this county be rid of the means by which the unlawful "usage," R.S. § 2004, 8 U.S.C. § 31 [42 U.S.C. 1971(a)], in this case asserts itself.

And the other concurring Justices, speaking through Mr. Justice Clark, indicated that the "Petitioners mainly rested their claims on the Fourteenth and Fifteenth Amendments, and [on Section 1971(a)]"[21] and they "abandoned a claim to money damages, apparently grounded on [Sections 1983 and 1985]."[22] Thus, it is quite apparent that the case was decided solely on the basis of Section 1971(a) as an implementation of the Fifteenth Amendment. The Court treated the cause of action in *Terry* v. *Adams* as arising under 42 U.S.C.

---

[21] 345 U.S. at 478, note 2.

[22] 345 U.S. at 478, note 3.

1971(a); it stated that that section was enacted "pursuant to the power granted by the second section of the Fifteenth Amendment"; and it approved the application of the statute to the facts of the case.

In addition to *Terry* v. *Adams,* Section 1971(a) has been invoked in many other cases which directly involved and turned on the question of whether the defendants had engaged in forbidden "state action", and in all of these cases it was held that they had.

In *Reddix* v. *Lucky,* 252 F. 2d 930, decided by the Court of Appeals for the Fifth Circuit in 1958, Sections 1971(a) and 1983 were relied on in an action to prevent a registrar of voters from discriminating against Negroes because of their race. With respect to Section 1971(a), the court stated (252 F. 2d at 933):

> Congress has implemented the Fifteenth Amendment, as it is authorized to do by its second paragraph, by the adoption of the Act of May 31, 1870, c. 114, § 1, 16 Stat. 140, formerly codified at 8 U.S.C.A. § 31; now 42 U.S.C.A. § 1971. * * *

Other decisions of a similar nature are *Smith* v. *Allwright,* 321 U.S. 649, *Nixon* v. *Condon,* 286 U.S. 73, *Baskin* v. *Brown,* 174 F. 2d 391 (C.A. 4); *Rice* v. *Elmore,* 165 F. 2d 387 (C.A. 4); *Chapman* v. *King,* 154 F. 2d 460 (C.A. 5), certiorari denied, 327 U.S. 800.

D. THE LEGISLATIVE HISTORY OF 42 U.S.C. 1971(a) CLEARLY DEMONSTRATES THAT IT HAS, AT ALL TIMES, BEEN INTENDED TO APPLY ONLY TO STATE ACTION

Section 1971(a) of 42 U.S.C. first appeared as Section 1 of the Enforcement Act of May 31, 1870.

Thereafter, unlike the remainder of the Act which was generally either repealed by Congress or declared unconstitutional by the courts, it remained in the statutes and received judicial enforcement, see *supra*, pp. 27–29. When the Civil Rights Act of 1957 was passed, 42 U.S.C. 1971(a) was included in Part IV of that Act. As the discussion below will show, it is clear that Congress has regarded 42 U.S.C. 1971(a), since its inception, as an implementation of the Fifteenth Amendment to the Constitution and applicable, therefore, only to state action.

1. The Legislative History of Section 1971(a) as Enacted in 1870 Shows That It Was Intended to Implement the Fifteenth Amendment

On April 19, 1870, there was introduced in the Senate and referred to the Committee on the Judiciary S. 810, a bill "to enforce the fifteenth amendment to the Constitution of the United States."[23] 90 Cong. Globe 2808. On April 25, S. 810 was reported out of committee with an amendment in the nature of a substitute for the bill. 91 Cong. Globe 2942. The substitute bill contained twelve sections dealing with the protection of voting rights and provided penalties for illegal individual action. 91 Cong.

[23] On February 21, 1870, H.R. 1293, a bill "to enforce the right of citizens of the United States to vote in the several States of this Union who have hitherto been denied that right, on account of race, color, or previous condition of servitude" was introduced in the House (89 Cong. Globe 1459) where it was later passed. It bore little resemblance to the Senate bill which was enacted into law. The bill as enacted was entitled a bill "to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes." 92 Cong. Globe 3915.

Globe 3479–80. Section 1 of the bill, which reads almost exactly like 42 U.S.C. 1971(a), provided (91 Cong. Globe 3479):

> That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.[24]

Sections 2 and 3 applied to election officials, the former requiring them to give equal "opportunity" to all and the latter declaring that a person who meets the state qualifications to vote shall be eligible to vote and that an official who refused to allow him to vote would be held liable. Section 4 struck at anyone who interfered by bribery, threat, or force

[24] When the bill passed the Senate, it had been amended to insert the word "constitution" between the adjective "any" and the noun "law" in the last clause. This was its wording as the Act of May 31, 1870, c. 114, Section 1, 16 Stat. 140. When the Revised Statutes of the United States were enacted in 1874, it appeared as Section 2004 with the words "or shall be", previously following the words "who are" and preceding the words "otherwise qualified" in the first clause, omitted. This is the present wording. The section also appeared in the United States Code from 1926 to 1952 as Section 31 of Title 8. In the 1952 edition of that work it was transferred to 42 U.S.C. 1971. In 1957, Public Law 85–315, Section 131(a), amended the catchline to read "Voting rights." Section 131(b) of P.L. 85–315 designated it as 42 U.S.C. 1971(a).

with the exercise of his right to vote. Section 5 allowed a writ of mandamus to be used by a defeated candidate if he lost as a result of a violation of the Act. Sections 6 through 10 set up the machinery for the enforcement of the Act, and Sections 11 and 12 permitted the President to use judges, marshals, United States Attorneys or the military forces to ensure enforcement.

Section 4 of S. 810 is the only one of the measures not specifically directed to state officials that received any consideration during the debate. Senator Stewart of Nevada stated the importance of this Section to the proponents of civil rights legislation as follows (91 Cong. Globe 3560):

> The fourth section standing alone is worth more than the whole House bill put together. It makes it an offense to interfere with the registration by outsiders and for outsiders or anybody to interfere with voters.

Senator Thurman of Ohio found fault with every section of the bill (91 Cong. Globe 3485) and was particularly concerned about its effect on individual action. He felt that the Fifteenth Amendment did not warrant action against "individuals—not officers of a State at all, mere private individuals, mere trespassers, mere breakers of the peace, mere violators of State law" (91 Cong. Globe 3661). However, all that he could say of Section 1 was this (91 Cong. Globe 3485):

> The only observation I have to make about that is that the thing is wholly unnecessary and nugatory if the fifteenth amendment is a part

Constitution of the United States. You
add any strength to the fifteenth con-
nal amendment by putting the very
al provision of that amendment into the
of a statute. The whole thing, therefore,
ly inofficious and nugatory.

is, when the Senate had discussed the
ion 3 on registration, Senator Morton of
knowledging that the Senate-rejected
d been confined to subjects contained in
n Amendment,' stated (91 Cong. Globe

he attention of the Senate to the fact that
provisions of the Senate bill are general,
t reference to the fifteenth amendment,
the first section, and that contains no
v at all, but is simply declaratory of the
ment itself. The first section might be
t so far as that is concerned, because it is
declaratory of the amendment itself.
endment relating to "individual" action
d by Senator Pool of North Carolina
be 3679). To be inserted as Sections 6
directed at conspiracies and masked
used terrorist methods to deprive Ne-
constitutional rights. It also provided
jurisdiction in a state court if the same
the laws of the state. The amendment
vithout debate and was not specifically
any of the later debate.
some supporters of the bill intended
st to apply to individual action. Sen-
ward of Michigan, and Morton spoke

as though the Fifteenth Amendment were broad enough to permit the Government to reach individual action. See, *e.g.*, 91 Cong. Globe 3611, 3655, 3670–1. Others, exemplified by Senators Casserly of California and Sherman of Ohio, restricted this to mean individuals acting under color of law. See, *e.g.*, 91 Cong. Globe 3671, 3663. Opponents of the bill such as Senators Thurman of Ohio and Davis of Kentucky could not seem to accept even this limited interpretation. See, *e.g.*, 91 Cong. Globe 3661, 3666. However, the defeat of an amendment by Senator Vickers (of Maryland), which would have inserted the words "under or by color of State authority" in Section 4, indicates that the majority did not want such a limitation in this section. 91 Cong. Globe 3684.

On May 20, 1870, the Senate passed the bill. 91 Cong. Globe 3690. Since the Senate version of the measure differed from that passed by the House, a conference was required. The conference committee accepted the Senate version. 91 Cong. Globe 3752.

Debate on the conference bill then ensued in the House. Three representatives—two in opposition to the bill and one in favor—commented on the effect of Section 1. All agreed that it was declaratory of the Fifteenth Amendment.

Representative Kerr of Indiana spoke against the bill, but even he said that "every single section of this bill * * * save only the first, involves a palpable violation of the spirit and letter of the Constitution." 92 Cong. Globe 3872.

Representative Swann of Maryland, also an opponent of the bill, stated that Section 1 was "affirmatory

only of the fifteenth amendment * * *." 94 Cong. Globe 432.

Representative Davis of New York, a proponent of the bill who had served on the conference committee, after noting that Representative Kerr had said that the bill, except for the first section, was unconstitutional, stated: "The first section is substantially a recital of the provisions of the Constitution." 92 Cong. Globe 3882.[25]

Although some proponents of the Civil Rights Act of 1870 believed that the Fifteenth Amendment cleared the way to federal restrictions against individual action not under color of law, this is not to indicate that Section 1 restated this concept. The opponents of the bill, who repeatedly parried the thrust at individual action made by Section 4, would hardly have treated Section 1 in the offhand manner that they did if it was understood also to be aimed at individual action. The critical examination by Senator Hamilton points out (94 Cong. Globe 357) that if Section 1 had faults, they were not in the area of "individual action." Section 1 was never referred to as applying

[25] Although the District Court conceded that Section 1 of the Enforcement Act stated only "general principles," it suggested, nevertheless, that the section may be unconstitutional. The court's theory runs as follows: Passage of the bill with other provision for dealing with deprivation of voting rights by individuals shows that those who favored the bill believed that the Fifteenth Amendment controlled individual as well as official action. Therefore, Section 1 as well, though it does not specifically say this, might just as well have been intended to apply to individual action. If this were so, however, it seems strange that even the most vigorous opponents of the bill (after attacking its unconstitutional provisions) conceded, as we have shown above, that Section 1 was constitutional.

to individual action at a time when the issue of "state action" and "individual action" was very sharply drawn. The "strict constructionists" of the Fifteenth Amendment accepted Section 1 as constitutional, indicating that in their views it was limited to state action. And there is no evidence of the expression of a contrary view by anyone with respect to this section.

2. The Legislative History of the Civil Rights Act of 1957 Demonstrates that Congress Intended by Section 1971(a) When Used in Conjunction With Section 1971(c), to Proscribe Only Those Acts and Practices Which Violate the Fifteenth Amendment

An examination of the history of the Civil Rights Act of 1957, as reflected in the committee reports and hearings and the debates, shows clearly that Congress was fully aware of the fact that, since the constitutional foundation for 42 U.S.C. 1971(a) is the Fifteenth Amendment, the effect of Section 1971(a) is limited to situations in which illegal action has been taken in the course of the electoral process under color of state law. This is shown by direct comment concerning the effect of Section 1971(a). It is also demonstrated by the fact that, in enacting new legislation affecting illegal individual action (Section 1971(b)), Congress took great care to state that such legislation was limited to elections for federal office.[26]

---

[26] Prior proposals for civil rights legislation in recent years followed the same pattern as the Civil Rights Act of 1957 in differentiating between the Congressional power to prohibit interference by anybody in federal elections as contrasted with the limited power to prohibit state action on the basis of race or color in other elections. Thus, in 1949, following the report of the President's Committee on Civil Rights (*To Secure These Rights* (1947) pp. 160–161) and President

Moreover, the hearings and debates are replete with references to state officials as potential defendants, and great emphasis is placed on instances of violations of voting rights under state authority. Finally, there are repeated assertions in both the hearings and the debate that the bill grants no new rights but only a new remedy in addition to the then existing criminal sanctions, *i.e.*, the use of the injunctive action by the Attorney General.[27] Thus, contrary to the conclusion reached by the District Court, it seems obvious that Congress regarded Section 1971(a), read alone, or with Section 1971(c), as applicable to state action only.

a. Hearings

The bill which ultimately became the Civil Rights Act of 1957 was H.R. 6127, introduced by Representative Celler, chairman of the Committee on the Judi-

---

Truman's message to Congress (94 Cong. Rec. 927–928), H.R. 4682 and S. 1725 followed the same structure as the present law. These bills did not pass either house, but the same proposals were introduced in succeeding sessions. (*E.g.*, 82d Cong., 1st Sess. (1951), H.R. 29, introduced by Rep. Celler; 2d Sess. H.R. 5945, introduced by Rep. Javits; 83d Cong., 1st Sess. (1953) H.R. 405, introduced by Rep. Celler; 84th Cong., 1st Sess. (1955), H.R. 627, introduced by Rep. Celler, S. 907, introduced by Sen. Humphrey.) The immediate predecessor of the 1957 Act was H.R. 627, 84th Cong., 2d Sess., introduced by Representative Celler. The hearings (Hearings before the Committee on Rules, House of Representatives, 84th Cong., 2d Sess., p. 47) and the Committee report (Report of House Committee on the Judiciary, H. Rep. No. 2187, 84th Cong., 2d Sess., on H.R. 627) make clear that Congress then realized, as it had before and since, that in so far as elections other than federal were concerned, the limitations of the Fifteenth Amendment were binding.

[27] Addition of a right to federal protection against individual interference in non-federal elections of course would have added a new right, not merely a new remedy.

ciary. A companion measure, S. 83, was sponsored by Senator Dirksen [28] and thirty-six other members of the Senate. Both bills embodied the proposals of the Administration for civil rights legislation [29] and the views of the Attorney General as to the meaning and purpose of the bills are therefore particularly important. Attorney General Brownell, testifying in support of S. 83, made it clear that he regarded Section 1971(a) as having application only to state action. At the same time he indicated to the committee the limited area in which individual illegal action in elections could be affected by federal law. Thus he said: [30]

> Beyond the provisions of the 14th and 15th amendments, *which inhibit only official action,* Congress has the broad power to protect voters in elections for Federal offices from action by private individuals which interferes with the right of the people to choose Federal officials.
>
> As the Supreme Court said in 1941 in *United States* v. *Classic* (313 U.S. 299, 315), this right to choose—
>
> "is a right secured by the Constitution * * * And since the constitutional command is without restriction or limitation, the right, unlike

[28] The Senate bill was never reported out of the Judiciary Committee. The Senate instead took up directly, debated, and passed the House bill.

[29] Cf. Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 1st Sess. (hereinafter referred to as 1957 Senate Hearings), p. 1; Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 85th Cong., 1st Sess. (hereinafter referred to as 1957 House Hearings), p. 589.

[30] 1957 Senate Hearings, pp. 2–3.

> those guaranteed by the 14th and 15th amendments, is secured against the action of individuals as well as of States."
>
> Congress passed many years ago statutes, now title 42, United States Code, sections 1971 and 1983, under which private persons claiming that they had been deprived of the right to vote on account of race or color *by persons acting under color of State law* have been able to bring civil suits for damages and preventive relief. [Emphasis added.]

In his testimony before the House committee, Attorney General Brownell further stated that none of the four proposals recommended for enactment as civil rights legislation—including, of course, the reenactment of 42 U.S.C. 1971 as 42 U.S.C. 1971(a)—would extend the area of civil rights jurisdiction in which the Federal Government was entitled to act. He continued: [31]

> * * * the enactment of our proposals * * * would permit the Federal Government to take civil remedial action instead of having to depend solely upon criminal procedures.[32]

It is clear from Mr. Brownell's remarks that he viewed the bills as creating only new civil remedies in areas which had previously been held to be constitu-

---

[31] 1957 House Hearings, p. 591. See also, 1957 House Hearings, pp. 606-607.

[32] The available criminal sanctions are explained in the 1957 Senate Hearings, at p. 3. It is there stated that they consist of 18 U.S.C. 241 and 594 when actions by private individuals interfering with federal elections are concerned, while 18 U.S.C. 242 may be used to prosecute persons acting under color of law to deprive individuals of their right to vote in any election because of race, color, religion or national origin.

tionally open to the Federal Government. His view is of course at odds with that of the District Court here, which interpreted the Act as attempting to create a right to reach private action where none existed previously.

Representative Celler concurred in the view of the Attorney General as to the meaning of the bill. In the course of hearings before the House Rules Committee, Mr. Celler was given a hypothetical situation of a threat to boycott anyone who voted for a particular candidate for local office, in an election in which both federal and local offices were at stake. Mr. Celler was asked whether in his opinion the boycott would constitute a violation of the Act, inasmuch as it might cause voters to stay away from the polls and thereby affect the Congressional election. While he hesitated to comment on the particular fact situation, he stated that in so far as individual action was covered by the bill it could be so only with respect to election for federal office. As he put it: [33]

> As I see this generally, the commitment and the intimidation and the coercion have to be directed against a Federal candidate. If it is directed against a local candidate who runs at the same time with a Federal candidate, it is unfortunate, but I do not think that this statute would get him.

It is noteworthy that in the testimony in both the House and the Senate Hearings strong emphasis was laid on violations of voting rights by state officials who were viewed as potential defendants in suits

[33] Hearings before the Committee on Rules, House of Representatives, 85th Cong., 1st Sess., on H.R. 6127, p. 44.

brought under the Act. The testimony of Attorney General Brownell refers repeatedly to the illegal conduct of state officials (1957 Senate Hearings, 1ff., 46ff., 180ff., especially pp. 3–7, 36, 77, 81, 183, 189, 205, 209). The statement of Assistant Attorney General Warren Olney III,[34] then in charge of the Criminal Division (in which civil rights cases were at that time handled), incorporated into the 1957 Senate Hearings at p. 237, is concerned with illegal actions of registrars. Likewise, Mr. Roy Wilkins, Executive Secretary of the National Association for the Advancement of Colored People, pointed out numerous instances of deprivation of voting rights by public officials. 1957 Senate Hearings, 291ff.[35] It is true that such allegations of state infringement of voting rights were vigorously contradicted by some of the legislators and state officials who denied the existence of state-inflicted discrimination.[36] But the point

---

[34] Supplemental statement by Assistant Attorney General Warren Olney III in response to questions by members of the Senate Subcommittee on Privileges and Elections, October 10, 1956. See also his letter of February 21, 1957, on the same subject, in 1957 House Hearings, p. 1219.

[35] See also his testimony in 1957 House Hearings, pp. 656, 659; testimony of Rep. Powell, 1957 House Hearings, p. 681; testimony of Chief Assistant Attorney General Gallion of the State of Alabama, 903ff.; and testimony of witnesses introduced by the N.A.A.C.P., 1957 Senate Hearings, pp. 502ff., Mr. Charles A. McLean; pp. 532ff., Mr. Gus Courts; pp. 564–565, Rev. W. D. Ridgeway.

[36] 1957 Senate Hearings, p. 261, Sen. Talmadge; pp. 270, 308, Sen. Ervin; p. 450, Asst. Atty. Gen. Grant of Texas; 1957 House Hearings, p. 738, Gov. Coleman of Mississippi; p. 808, Rep. Lanham; p. 989, Attorney General Gremillion of Louisiana; p. 1173, Attorney General Bennett of Arkansas.

is that the measure was generally understood to be aimed only at state action.

b. Committee Reports

In the Report of the Judiciary Committee of the House (H. Rep. No. 291, 85th Cong., 1st Sess., pp. 13–15), there is reproduced a letter from the Attorney General to the Speaker of the House which discusses (1) the scope of Section 1971(a), and (2) the changes the Department of Justice proposed in connection with voting rights. In this letter, the Attorney General made this statement: [37]

> The existing civil voting statute (sec. 1971 of title 42, U.S.C.) declares that all citizens who are otherwise qualified to vote at any election (State or Federal) shall be entitled to exercise their vote without distinction of race or color. *The statute is limited, however, to deprivations of voting rights by State officers or other persons purporting to act under authority of law.* In the interest of proper law enforcement to guarantee to all of our citizens the rights to which they are entitled under the Constitution, I urge consideration by the Congress * * * of three changes.
>
> First, addition of a section which will prevent anyone from threatening, intimidating, or coercing an individual in the exercise of his right to vote, whether claiming to act under authority of law or not, in any election, gen-

[37] H. Rep. No. 291 at p. 15. The letter, dated April 9, 1956, discusses the Administration's 1956 proposals for civil rights legislation. Since the same recommendations were made in 1957 this letter was incorporated into the 1957 reports.

> eral, special, or primary, concerning candidates for Federal office. [Emphasis added.]

As indicated above (p. 47), the interpretation placed upon the proposals by the Attorney General deserves particular consideration, in light of the fact that Administration proposals were here involved.

The Report (pp. 11–12) made it clear that Congress understood (1) that Section 1971(a) could apply only to cases involving state action, and (2) that individual interference with voting rights was reachable under federal law only in elections for federal office. In the first place, the only reference to an application of Section 1971(a) occurs in conjunction with Section 1983,[38] which provides sanctions only against state action. Secondly, the only provision with which the Report shows concern as to constitutionality is that dealing with application of Section 1971(b) to interferences by individuals in federal elections. The Report states (p. 12):

> Insofar as the right of Congress to protect voters in elections for Federal offices from interference by action of private individuals, as distinguished from official action under the color of law, is concerned, again the ruling in the case of *U.S.* v. *Classic, supra* [313 U.S. 299],

[38] 42 U.S.C. 1983 reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

> is controlling. Under that ruling the right to choose [federal officers]—
>
> "is a right secured by the Constitution * * * and since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the 14th and 15th amendments, is secured against the action of individuals as well as of States * * *."

The Report also indicates (pp. 5–6)—as did the Attorney General—that the proposed legislation would not increase the area of civil rights jurisdiction in which the Federal Government is entitled to act, but would merely substitute civil for criminal remedies in an already established field.

The Report of the Subcommittee on Constitutional Rights of the House Judiciary Committee,[39] also, clearly shows that interference with voting by private individuals was to be affected by the Act only with respect to elections for federal office. Thus, in the only reference to protection against individual action, it states that:

> This subsection [1971(b)] makes clear that it is unlawful for a private individual as well as one acting under color of law to interfere with the right to vote at any general, special, or primary election *concerning Federal offices* [Emphasis added; 103 Cong. Rec. 11476].

c. Floor Debate

Throughout the debate on the bills, the legislators in both Houses viewed what is now Section 1971(a) as

[39] Report to accompany S. 83, 85th Cong., 1st Sess., Subcommittee Print. This Report is reproduced in 103 Cong. Rec. 11475.

implementing the Fifteenth Amendment.[40] Throughout the debate we find that state officials are regarded as potential defendants.[41] And, as occurred during the hearings, opponents of the legislation denied the need for legislation to protect voting rights, disclaiming state infringement of these rights.[42]

Senator Douglas explained the dual constitutional basis for the protection provided for voting rights by the proposed legislation: (1) Article I of the Constitution (with respect to private or state action which interferes with federal elections), and (2) the Fifteenth Amendment (with respect to state action which interferes, by reason of race or color, with the exercise of the franchise in federal or state elections). He said (103 Cong. Rec. 10988):

> Not only does Congress have the power, but it also has the duty to protect this right to vote against interference by State officials under not only the 15th but also the "equal protection of the laws" clause of the 14th amendment.

---

[40] See, 103 Cong. Rec. 12150, Senator Neuberger; 12564, 13112, Senator Knowland; 12829, Senator Humphrey; 13188, Senator Bush; 13876, Senator Hruska; 13324, Senator Church; 13333, Senator Allott; 13319, Senator Kuchel; 13322, Senator Case (N.J.).

[41] See, 103 Cong. Rec. 12149, Senator Clark; 13120, 13126, Senator Humphrey; 8498, 9396, Rep. Keating; 8705, Rep. Diggs; 12828, Senator Douglas; 12898, 12900, 13006, 13732, Senator Javits; 13320ff., Senator Case (N.J.).

[42] 103 Cong. Rec. 13881, Senator Sparkman; 16402, Senator Thurmond; 8653, Rep. Frazier; 8856, Rep. Lanham; 11697, Senator Holland; 11698, 12898, Senator Ervin; 12310, 11684, Senator Long; 11081, Senator Fulbright. Cf. remarks of Rep. Celler, 9020.

> Furthermore, the Supreme Court has held (*United States* v. *Classic* (313 U.S. 299)) that this right to vote in Federal elections is also guaranteed by article 1, section 2 of the Constitution, and can be protected by the Federal Government against infringement by individuals as well as by State or local bodies.

Repeatedly the point was made in the debates that the proposed law did not enlarge on existing rights, but merely implemented those in existence.[43]

Thus, in the light of the legislative history of Part IV of the Civil Rights Act of 1957, as well as of the preceding proposals closely related to that portion of the Act, it is manifest that the Congress was fully aware that the legislation now embodied in 42 U.S.C. 1971 would empower the Attorney General to act under two separate and distinct sources of authority, the one applicable to both private and state action but limited to federal elections; the other extending not only to federal elections but also to state elections, but limited to acts of discrimination by or under the authority of a state. 42 U.S.C. 1971(a) embodies the latter concept.

E. 42 U.S.C. 1971(a) AND (c) CAN AND SHOULD BE CONSTRUED SO AS TO SAVE RATHER THAN TO DESTROY THEM

It is submitted that the foregoing analysis demonstrates that 42 U.S.C. 1971(a) and (c) were intended to be, and in fact are, limited to actions which Congress may constitutionally reach under the Fifteenth Amendment. However, even if the District Court

---

[43] 103 Cong. Rec. 8498, Rep. Keating; 11834, Senator Ives; 13139, Senator Bush; 13876, Senator Hruska.

ubt about the constitutionality of these sub-
should have construed them so as to sustain
titutionality. For a statute is presumed to
"until its violation of the constitution is
beyond all reasonable doubt." *Ogden* v.
12 Wheat. 213, 270. And if a serious doubt
to the constitutionality of a statute, it must
ued, when fairly possible, so as to meet the
of the Constitution. In other words, if these
ctions could be read to apply either to state
ne or to both private and state action with
purely state and local elections, they should
construed so as to exclude their possible
n to purely private actions.

urt has consistently followed this principle
ry construction, even in cases which pre-
ch more serious problems of interpretation
resented here. Thus, in *United States* v.
5 U.S. 41, where it was contended that a
olution regulating lobbying activities was
ional, in that it reached activities which
d the power of Congress to regulate, Mr.
ankfurter, speaking for the Court, stated

* [T]he phrase "lobbying activities" in
esolution must be given the meaning that
fairly be attributed to it, having special
rd for the principle of constitutional ad-
ication which makes it decisive in the choice
fair alternatives that one construction may
se serious constitutional questions avoided

by another. In a long series of decisions we have acted on this principle. In the words of Mr. Chief Justice Taft, "[i]t is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality." *Richmond Co.* v. *United States,* 275 U.S. 331, 346. Again, what Congress has written, we said through Mr. Chief Justice (then Mr. Justice) Stone, "must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity." *Lucas* v. *Alexander,* 279 U.S. 573, 577. As phrased by Mr. Chief Justice Hughes, "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson,* 285 U.S. 22, 62 and cases cited.

Mr. Justice Holmes thus stated the rationale of the rule in *Blodgett* v. *Holden,* 275 U.S. 142, 147–148:

> Although research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an Act of Congress unconstitutional, I suppose that we all agree that to do so is the gravest and most delicate duty that this Court is called on to perform. Upon this among other considerations the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same.

See also *Ashwander* v. *T.V.A.*, 297 U.S. 288, concurring opinion by Mr. Justice Brandeis at 346–348, and authorities cited. And see, *Coffman* v. *Breeze Corporations*, 323 U.S. 316, 324–325; *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 569; *United States* v. *Petrillo*, 332 U.S. 1; *United States* v. *Harriss*, 347 U.S. 612, 618; *Screws* v. *United States*, 325 U.S. 91.

In *Hurd* v. *Hodge*, 334 U.S. 24, this Court construed the general language of 42 U.S.C. 1982, forbidding interference with property rights, as limited to governmental actions, a direct precedent for a similar interpretation here.

The District Court disregarded these authorities and gave to the Act here involved a strained construction which would render it unconstitutional. This was plain error.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the District Court should be reversed.

WILLIAM P. ROGERS,
Attorney General.
J. LEE RANKIN,
Solicitor General.
W. WILSON WHITE,
Assistant Attorney General.
JOHN F. DAVIS,
Assistant to the Solicitor General.
HAROLD H. GREENE,
DAVID L. NORMAN,
Attorneys.

SEPTEMBER 1959

U. S. GOVERNMENT PRINTING OFFICE: 1959

LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
NOV 9 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 64.

UNITED STATES OF AMERICA,
Appellant,

v.

JAMES GRIGGS RAINES et al.,
Appellees.

Appeal from the United States District Court for the Middle District of Georgia.

BRIEF FOR APPELLEES.

CHARLES J. BLOCH,
ELLSWORTH HALL, JR.,
520-5 First National Bank Building,
Macon, Georgia,
ROBERT L. RUSSELL, JR.,
Winder, Georgia,
PETER ZACH GEER,
Colquitt, Georgia,
Counsel for Appellees.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

Page

Questions presented 1

The cross-appeal 27

Conclusion 55

Appendix 57

Cases Cited.

Aetna Ins. Co. v. Busby, 87 F. Supp. 505, 507 53

Alabama Public Service Commission et al. v. Southern Railway Co., 341 U. S. 341, 349-50 36

Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U. S. 563, 83 L. Ed. 987, 59 S. Ct. 657, 660 33

Baldwin v. Franks, 120 U. S. 678 14

Barney v. The City of New York, 193 U. S. 430 ....41, 43

Barrows v. Jackson, 346 U. S. 249 (1953) 15

Brillheart v. Excess Ins. Co., 316 U. S. 491, 62 S. Ct. 1173 (h. n. 2) 53

Brown v. Board of Trustees of LaGrange Independent School District et al., 187 F. 2d 20 (5th Cir.) 36

Butts v. Merchants Transportation Co., 230 U. S. 126, 134 12

Carter v. Carter Coal Co., 298 U. S. 238, 316 (56 S. Ct. 875) 13

City of Louisville v. Cumberland Telephone & Telegraph Co., 155 Fed. 725 (C. C. A. 6th Circuit) 43

Civil Rights cases, 109 U. S. 3 8

Collins v. Hardyman, 341 U. S. 651 .....8, 24

Cook v. Davis, 178 F. 2d 595 .....39, 52

Covington & Cincinnati Bridge Co. v. Hager, 203 U. S. 109 54

Cruikshank v. United States, 92 U. S. 542, 555 .....20, 21

Dawson v. Columbia Trust Co., 197 U. S. 178 44

Eccles v. Peoples Bank, 33 U. S. 431-2, 68 S. Ct. 644 53
Ex parte Young, 209 U. S. 123, 28 S. Ct. 441, 453, 52 L. Ed. 714 20

Fox v. Standard Oil Co., 294 U. S. 87 31

Georgia Railroad and Banking Co. v. Redwine, 342 U. S. 299, 72 S. Ct. 321, 96 L. Ed. 325 19
Gladish v. Lovewell, 130 S. W. 579, 581, 95 Ark. 618 35
Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293, 63 S. Ct. 1070 53

Hall v. First National Bank, 85 Ga. App. 498 (3) 45
Hamilton Gas Light Co. v. Hamilton, 146 U. S. 258, 266 43
Hanks et ux. v. City of Port Arthur, 121 Texas 202, 48 S. W. 2d 944, 83 ALR 278, 279 (4) 17
Heine v. Levee Commissioners, 19 Wall. 655, 660 32
Hill v. Wallace, 259 U. S. 44, 70 (42 S. Ct. 459) 14
Holmberg v. Ambrecht, 327 U. S. 582 52
Home Telegraph and Telephone Co. v. Los Angeles, 227 U. S. 278, 294, 33 S. Ct. 312, 57 L. Ed. 510 45

Illinois Central Railroad Co. v. McKendree, 203 U. S. 514, 529 11
Innes v. Hiatt, 57 F. Supp. 17 54
Iron Mountain R. Co. v. Memphis, 96 Fed. 113, 126 43
Irwin v. Dixon, 9 Howard 10 31

James v. Bowman, 190 U. S. 127 ..... 8, 21, 25, 26

Lackey v. United States, 107 Fed. 114 21
Lee v. Brickell, 292 U. S. 415 31
Liberty Oil Co. v. Condon National Bank et al., 260 U. S. 235, 243, 43 S. Ct. 118 (7) 33

McCabe v. AT&SF R. Co. (1914), 235 U. S. 151, 162 35
Memphis v. Cumberland Tel. Co., 218 U. S. 624 44
Michaelson v. United States ex rel. C. St. P. M. & O. R. Co., 266 U. S. 42, 35 ALR at p. 457 34

Mountain Timber Company v. Washington, 243 U. S. 219 17
Murray v. Charleston, 96 U. S. 432, 440 43
Natural Gas Pipe Line Co. v. Slattery, 302 U. S. 300, 310 30
New Orleans Water Works v. La. Sugar Co., 125 U. S. 18, 31 43
O'Donoghue v. United States, 289 U. S. 516, 530 28
Orleans Parish School Board v. Bush, 242 F. 2d 156, 161 18-19
Peavy v. Cox, 190 F. 2d 123 .....39, 52
People of the State of Illinois ex rel., Barrett v. Union Bank and Trust Co., 362 Ill. 164, 199 N. E. 272, 104 ALR 1090 (6) 18
Phoenix Mut. Ins. Co. v. Bailey, 13 Wall. 616 31
Prentis v. Atlantic Coast Line et al., 211 U. S. at page 230 .....44, 47
Rast v. Van Deman & Lewis, 240 U. S. at p. 366 49
Reagan v. Farmers Loan and Trust Co., 154 U. S. 362 41
Reddix v. Lucky, 252 F. 2d 930 19
Robinson v. Campbell, 3 Wheaton 212 (1818) 34
Savannah, etc., Ry. Co. v. Savannah, 198 U. S. 392 43
Shanks v. Banting Mfg. Co., 9 F. 2d 116 45
Shelley v. Kraemer, 334 U. S. 1, 13, 68 S. Ct. 836, 842, 92 L. Ed. 1161 24
Smith v. Allwright (1944), 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 987 .....23, 24
Snowden v. Hughes, 321 U. S. 1, 13, 16 20
South Carolina v. United States, 199 U. S. at pages 448-9 56
Sprague v. Ticonic National Bank, 307 U. S. 161, 165, 59 S. Ct. 777, 779 34
Stefanelli v. Minard, 342 U. S. 117, 72 S. Ct. 118 (h. n. 7) 53

St. Paul Gas Co. v. St. Paul, 181 U. S. 142, 148 43

The Chicago Junction case (1924), 264 U. S. at page 290 13

Trade Mark Cases, 100 U. S. 82, 98 14

Truly v. Wanzer, 5 Howard 141 31

United States ex rel. Guagliardo v. McElroy, 259 F. 2d 927 (certiorari granted, 359 U. S. 904, 79 S. Ct. 580) 14

United States of America v. Amsden et al., 6 Fed. 819 21

United States v. Harris, 106 U. S. 629 ..... 8, 21

United States v. Jackson, 26 Fed. Cases, p. 563, Case No. 15459 (1874) 21

United States v. Ju Toy, 198 U. S. 253, 262 14

United States v. Reese et al., 92 U. S. 214 ..... 10, 14, 56

United States v. Williams, 341 U. S. 70, 92, 71 S. Ct. 581, 593 ...) 24

Updegraff v. Talbott, 221 F. 2d 342 55

Williams v. Standard Oil Co., 278 U. S. 235, 242 13

Yu Cong Eng v. Trinidad, 271 U. S. 500, 518-522, 46 S. Ct. 619, 623-625 14

Statutes Cited.

Georgia Annotated Code:

Section 2-2704 45

Section 6-101 45

Section 34-116 ..... 41, 45

Section 34-117 ..... 40, 45

Section 34-118 40

Section 34-119 40

28 U. S. C. 1252 ..... 2, 3

28 U. S. C. 1345 27

42 U. S. C. 1971 ..... 1, 2, 6, 7, 8, 20, 24, 25 26, 27, 28, 42, 52, 56

Miscellaneous Cited.

11 Am. Jur., Constitutional Law, Sec. 112 16
11 Am. Jur., Constitutional Law, Sec. 180 28
28 Am. Jur., Injunctions, Sec. 35 49
28 Am. Jur., Injunctions, Sec. 37 31
Constitution of the United States, Art. 3, Sec. 2, Cl. 1 28
Constitution of the United States, Fifteenth Amendment, Section 2 ..... 6, 8, 21
Cyclopedia of Federal Procedure, Third Edition, Vol. 1, Sec. 20164 33
Encyclopedia of Federal Procedure, 3rd Edition, Vol. 15, Section 84.34 54
Federal Digest, Courts, Key Number 265 55
Foster's Federal Practice, Vol. 1, Sec. 5 33
House Hearings of February 4, 5, 6, 7, Serial No. 1, p. 601 ..... 49, 50
Revised Statutes of Georgia, Section 5507 ..... 25, 26
Senate Hearings, 1957 ..... 8, 9, 11, 51

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 64.

UNITED STATES OF AMERICA,
Appellant,

v.

JAMES GRIGGS RAINES et al.,
Appellees.

Appeal from the United States District Court for the Middle District of Georgia.

BRIEF FOR APPELLEES.

QUESTIONS PRESENTED.

In the notice of appeal filed by the United States April 23, 1959, the following questions were stated as being presented:

1. Whether 42 U. S. C. 1971 (a) and (c) . . . Part IV of the Civil Rights Act of 1957 . . . providing for the institution of civil actions for preventive relief by the Attorney General for or on behalf of the United States is constitutional.

2. Whether 42 U. S. C. 1971 (a) and (c) . . . Part IV of the Civil Rights Act of 1957 . . . must be construed to authorize the institution of civil actions by the Attorney

General against private persons not acting under color of state law (R. 42).

In the Jurisdictional Statement filed in the Supreme Court in May of 1959 (pp. 3 and 4) under the subhead, "Question Presented", is this statement: ". . . the question is whether subsections (a) and (c) are unconstitutional *in toto* because, as construed by the District Court but not by the government or by any other court, they may permit the Attorney General to seek injunctive relief "against a private citizen for an individual act, divorced completely from state action".

In the brief for the United States filed in this Court in September of 1959 (p. 4), under the subhead "Question Presented" is this statement: "Whether the District Court erred in construing subsections (a) and (c) of 42 U. S. C. 1971 to authorize injunctive suits by the Attorney General with respect to private action depriving citizens of the right to vote, and in holding that, as so construed, the subsections were unconstitutional *in toto,* in a case in which the only action involved was state, not private, action." (In the Government's brief filed in the District Court [p. 2], it is said: ". . . the present action is not one against the State of Georgia but merely against certain individuals acting unlawfully" [Emphasis added]).

Before presenting and arguing what we deem to be the question decided by the District Court in dismissing the complaint, and the questions presented by the cross-appeal (R. 43), we pose this question:

Does the Supreme Court have jurisdiction of this appeal?

We respectfully suggest that, despite the provisions of 28 U. S. C. 1252, this Court does not have jurisdiction because the appellant has injected into the case a question other than that of whether an Act of Congress is

constitutional. In the appeal there is presented a question of **construction** of the Act of Congress. In the notice of appeal (R. 42), two questions were presented. The second of those was whether (the statute) must be construed to authorize the institution of civil actions by the Attorney General against private persons not acting under color of state law.

We respectfully submit that the inclusion by the United States of that question in their appeal deprives this Court of its jurisdiction under 28 U. S. C. 1252.

Evidently counsel for the United States have some doubt as to the jurisdiction of this Court. That doubt is evidenced in their brief (pages 6-7, 10-16). At page 16, counsel say: "That holding created the occasion **and necessity** for a direct appeal to this Court" (Emphasis supplied). Section 28 U. S. C. 1252 confers a privilege, not an obligation, on the United States.

Was the judgment of the District Court dismissing the complaint (R. 41) **correct?**

In arguing that question, we emphatically reject the contention of counsel for the appellant in their third effort to pose the question presented (Their brief, page 4). This is **not** "a case in which the only action involved was state, not private action."

It is charged in the complaint that the appellees "while discharging the duties of the offices aforesaid were acting under color of law of the State of Georgia."

But acts proscribed by the Fifteenth Amendment are not acts of individuals even though such acts are performed at a time when those individuals are state officers.

The first section of the Fifteenth Amendment is: "The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any

State on account of race, color, or previous condition of servitude."

The complaint in this case does not allege any abridgement or denial of rights of citizens to vote by the United States or by any State. Specifically, the complaint does not allege any such denial or abridgement by the State of Georgia. The complaint does not allege "a case in which the only action involved was State, not private, action."

If the appellees had been guilty of the acts and practices alleged in the complaint, they would have been guilty of a violation of the laws of Georgia; they would have been acting contrary to the laws of Georgia.

While, belatedly, counsel claim now that the only action involved was state action, the complaint which they filed shows that the alleged acts and practices were those of the individual defendants.

Allegedly, they include "arbitrary and discriminatory delay in handling applications of Negroes for registration; the arbitrary refusal to register Negroes . . .; and the discriminatory application of more difficult and more stringent registration standards to Negro applicants from those applied to white applicants" (R. 3-4, complaint paragraph 9).

Then follows (R. 4) this language: "Said acts and practices were and are further designed and intended **by defendants** to perpetuate the disparity referred to . . ." An abridgement or denial by the State of Georgia? Acts and practices designed and intended by the State of Georgia to perpetuate disparity between the voters of the different races? No. The alleged acts and practices were designed and intended by the defendants. That none of the alleged acts and practices were those of the State, but that all of the alleged acts were those of the defendants,

if true, is further demonstrated by the averments of paragraph 14 of the complaint (R. 6). It is there alleged that certain Negro citizens were "**arbitrarily and without legal cause . . . prevented by said defendants** from demonstrating to write correctly and legibly . . ." (Emphasis added).

That averment is repeated in paragraph 16 of the complaint (R. 7).

And in paragraph 17 of the complaint it is categorically alleged:

> "**Defendants** in the administration of the literacy test provided by the Georgia Constitution, **have applied** different and more stringent registration standards to Negro applicants from those they applied to white applicants" (R. 7). (Emphasis added).

Then follows paragraph 18 of the complaint:

> "The application of different standards by defendants as aforesaid was not accidental but was **designed and intended by them** to discriminate against Negro applicants on account of their race or color" (R. 7) (Emphasis added).

If the allegations of the complaint are true they make this case: The State of Georgia has enacted constitutional and statutory provisions regulating the right to register and vote. The State of Georgia has discriminated against no one mentioned in the complaint. In the administration of the tests provided by law, the defendants who are registrars have not complied with the laws of the State of Georgia, but have arbitrarily and without legal cause prevented certain individuals from complying with the standards fixed by the law of Georgia. The defendants who are registrars have designedly and intentionally applied different and more stringent standards to Negroes

from those applied to whites. They have done those things arbitrarily and without legal cause.

Even if those allegations were true, where would there be any denial or abridgement by the State of Georgia? Where would there be any denial or abridgement by the State of Georgia? Where would there be any action of the State of Georgia? All of the alleged actions were not only those of the State of Georgia, but, if true, directly contrary to the laws of Georgia.

Congress under Section 2 of the Fifteenth Amendment, has power to enforce the amendment by appropriate legislation. Appropriate legislation is confined to the express subject matter of the amendment, to wit: Neither the United States nor any State may deny or abridge the right of citizens of the United States to vote on account of their race, color, or previous condition of servitude.

Appropriate legislation is confined to the prevention of denials or abridgements by a State or the United States.

So that, even had this case been one in which the only action involved was a denial or abridgement by the State, the order of the District Judge dismissing the complaint would have been a correct one. It would have been a correct one for that the reasons assigned for the ruling are correct conclusions of constitutional law as they have been heretofore declared.

As originally enacted in 1870 and as it remained in the statutes from 1870 until 1957, the present subsection (a) of Title 42, Section 1971 (formerly Section 1971 in its entirety), was merely a general statement of principle or of rights without any sanction or remedy for its violation. Standing alone it declared a right but the declaration was unavailing without implementation. So far as this case is concerned, the Civil Rights Act of 1957, in what is now Section 42 U. S. C. 1971 (c), provided the

implementation. That implementation went too far; it exceeded the powers granted to Congress under the Fifteenth Amendment, for under (a) and (c) the Attorney General is permitted to institute proceedings for preventive relief in cases where the alleged deprivation is that of a private citizen acting as a private citizen.

Section (c) standing alone in summary is: "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) . . ., the Attorney General may institute for the United States . . ., a civil action or other proper proceeding for preventive relief, including an application for . . . injunction . . ."

What is "the right or privilege secured by subsection (a)"?

The Government has answered that question for us in paragraph one of the complaint (R. 1). It there defined that right or privilege as "the right and privilege of citizens of the United States who are otherwise qualified by law to vote at any election by the people in the State of Georgia to be entitled and allowed to vote at all such elections without distinction of race or color."

So, coupling the new 1971 (c) with the old 1971 [1971 (a)], the two together would read:

> "Whenever **any person** has engaged or there are reasonable grounds to believe that **any person** is about to engage in any act or practice which would deprive any other person of the right and privilege of being entitled and allowed to vote at all such elections without distinction of race or color . . . the Attorney General may institute for the United States . . ., a civil action or other proper proceeding for preventive relief, including an application for . . . injunction, . . ."

Thus, as found by the court below, and as one of the reasons assigned for its ruling:

> "Subsection (c) creates a remedy against purely private, as distinguished from state, deprivation of voting rights on account of race or color" (R. 37).

The creation of such a remedy permitting "the Attorney General to seek an injunction against a private citizen for an individual act, divorced completely from state action" (R. 39), is not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment. An unbroken line of decisions establishes this principle of Constitutional Law. **United States v. Harris,** 106 U. S. 629; **Civil Rights cases,** 109 U. S. 3; **James v. Bowman,** 190 U. S. 127; **Collins v. Hardyman,** 341 U. S. 651.

In their brief, counsel for the United States assert that the legislative history of the Civil Rights Act of 1957 demonstrates that Congress intended by Section 1971 (a), when used in conjunction with Section 1971 (c), to proscribe only those acts and practices which violate the Fifteenth Amendment (Brief, page 45). Following this assertion are eight pages of copious quotations from and allusions to the hearings before Congressional Committees, Committee Reports, and Floor Debate. During the discussion, counsel say: "But the point is that the measure was generally understood to be aimed only at state action" (Brief, pages 50-51).

Counsel overlooked the colloquy between Senator Ervin and Attorney General Brownell at pages 50-51 of the 1957 Senate Hearings, which was followed by this statement of Senator Ervin at page 344 of the same hearings:

> "Some of the proposed legislation evidently proceeds on the theory that the present court is going to strike down some of those old decisions which hold that the 14th Amendment (sic) cannot be applied to

anything except State action. How the present court can be expected to hold that the simple English used in the 14th Amendment applies to any action other than that of the State exceeds my comprehension."

At page 50 of their brief, footnote 36, counsel allude to the testimony of Senator Talmadge at page 261 of the Senate Hearings. We respectfully call the attention of the Court to Senator Talmadge's testimony at page 258 of the Senate Hearings:

"The proposal to protect the right to vote by providing for injunctive proceedings initiated by the Attorney General against any individual who may be thought to be interfering with the right of another individual to vote is totally without constitutional authority. The Supreme Court has held repeatedly that the 14th and 15th Amendments can be implemented only with respect to State action and only then in cases where the franchise is denied due to unlawful discrimination on account of race, color, or previous condition of servitude."

At this same point in their brief, counsel for the Government allude to Senator Ervin's statements at pages 270 and 308 of those hearings. We respectfully call to the attention of the Court Senator Ervin's comprehensive statement at pages 389-391 of those same hearings.

The case before the Court is a realization of the fears expressed by those Senators.

The Attorney General cannot convert constitutionally inappropriate or invalid legislation into appropriate or constitutional legislation by allegations in a complaint or even by seeking to use that legislation in a case where a State was shown to be abridging or denying the right to vote contrary to the Fifteenth Amendment.

Let us assume that Congress enacted a statute providing that if any person sought to hinder any other person from exercising his right to vote, the Attorney General might institute proceedings in the name of the United States to prevent such hindrance. That statute would be palpably unconstitutional. But, the argument of the Government is that it could nevertheless be used to permit the Attorney General to enjoin state officers in actions which amounted to a State's abridging or denying a person's right to vote on account of his race, color or previous condition of servitude.

The unsoundness of that argument was demonstrated eighty-five years ago in the case of **United States v. Reese, et al.**, 92 U. S. 214. There the Court held:

> "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts, without as well as within the constitutional jurisdiction, can be limited by judicial construction, so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there" (op. cit. p. 221).

We do not mean even to intimate that Congress has the power to grant to the Attorney General the right to institute an injunction proceeding in the name of the United States based upon the allegations of the complaint in this case. We confidently assert that pursuant to the Fifteenth Amendment Congress can enact legislation only to prevent

the United States' or a State's abridging or denying the right to vote on account of race, color or previous condition of servitude. We assert that where a person who may be a State officer is acting contrary to the laws of the State and in the teeth of those laws his deeds cannot constitute an abridgement or denial on the part of the State. We do not, however, have the burden of maintaining those assertions here, for what the Congress has done is forbidden by the Reese case. It is true that there the Court was dealing with a penal statute. Here we are dealing with a statute authorizing an injunction, violation of which may carry its own penalty. The principle is the same. During the hearing on the Civil Rights Act of 1957, Senator Ervin said:

> "Certainly, Mr. Attorney General, if Congress has no power to provide any criminal penalties for those acts under the Constitution because it has no right to legislate in that particular area, it certainly would have no right to enact a civil law."

Attorney General Brownell replied:

> "That is correct, and we are not asking for that. Anywhere it has been ruled against under the Constitution of the United States, the Federal Government does not have authority to act, it would still be out under the proposed legislation."

Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, February 14, 1957, p. 25.

In **Illinois Central Railroad Co. v. McKendree,** 203 U. S. 514, 529, Mr. Justice Day speaking for a unanimous court, quoted the language from the Reese case which we have just quoted in support of this ruling:

> "As order of the Secretary of Agriculture, No. 107, purporting to fix a quarantine line under the Cattle Contagious Disease Act applies in terms to all ship-

U. S. C. 1971. It was originally passed in 1870, as a part of the Enforcement Act, consisting of 23 sections, all of which, except it, had been declared unconstitutional or repealed. **Cruikshank v. United States**, supra; **United States v. Jackson**, 26 Fed. Cases, p. 563, Case No. 15459 (1874); **United States of America v. Amsden et al.**, 6 Fed. 819;* **Lackey v. United States**, 107 Fed. 114; **United States v. Harris**, 106 U. S. 629; **James v. Bowman**, 190 U. S. 127. It did nothing more than the Fifteenth Amendment *proprio vigore*. Its own force enabled it to accomplish nothing. Standing alone it could do no more in the way of punishing or preventing than could one of the Ten Commandments. Among those handed down to Moses was "Thou shalt not kill" but murder is punished only when there shall have been passed a valid statute providing for the punishment of murderers.

Counsel for the United States (their brief page 35) say that "42 U. S. C. 1971 (a) was given full force and effect by this court in the recent case of Terry v. Adams, 345 U. S. 461. It was there held that the section was adopted by the Congress 'acting pursuant to the power granted by the second section of the Fifteenth Amendment' (345 U. S. at 468)."

Counsel preface a four page discussion of Terry v. Adams with the statement that "The District Court in the instant case **declined to follow**" it. (Emphasis added.)

What the District Judge **did do** with respect to Terry v. Adams is shown by the following quotation from his opinion:

---

* It was in this case (at p. 824) that Judge Gresham said: "The Federal Government can exercise only such powers as have been conferred upon it, and however reprehensible the acts described in the indictment may be unless they are done on account of race, etc., and *under the authority of legislation which is prohibited by the 15th amendment*, it is in the exclusive province of the state to punish the offenders." (Emphasis ours.)

"It should be noted at the outset that this action is one brought by the Attorney General in the name of and on behalf of the United States. It is not an action by the allegedly wronged party under the provisions of 42 U. S. C. 1983, and differs materially from those cases. In that type of case, the 'self-executing ban' of the Fifteenth Amendment proscribes certain conduct and Section 1983 provides a remedy therefor, without resort to 42 U. S. C. 1971. It was the availability of this 'self-executing ban' which has heretofore allowed the Supreme Court to apparently by-pass a clear ruling on the constitutionality of Section 1971-a: Terry v. Adams, 345 U. S. 461, 481. In the instant case, however, the Attorney General has no standing for the bringing of this action, except the recently enacted provisions of Section 1971. Any right that he has to seek preventive relief, where citizens allegedly have been or are about to be denied their right to vote on account of race, is based on Section 1971 (c). Prior to its enactment, such an action could not have been entertained. Thus it is that the question of the constitutionality of that Section cannot be sidestepped or by-passed. Due to the wording of subsection (c) of the statute and the way in which it is tied to subsection (a), the latter must be given its first really critical examination.

"As originally enacted and as it remained on the statute books of this country from 1870 until 1957, the present subsection (a) (formerly Section 1971 in its entirety), was **merely a general statement of principle or of rights, without providing any sanction or remedy for its violation.** U. S. v. Reese, 92 U. S. 214; U. S. v. Cruikshank, 92 U. S. 542. **For this reason, no action could ever be based upon this section alone"** (R. 29, Emphasis added).

Terry v. Adams originated in the Southern District of Texas (90 F. S. 595). The District Judge rendered a

decree favorable to the plaintiffs. The Court of Appeals for the Fifth Circuit reversed (193 F. 2d 600). The reason for the reversal was the belief of the Court of Appeals that the acts complained of were those of individuals rather than the State (op. cit. p. 602). This judgment was reversed by the Supreme Court. Mr. Justice Black announced the judgment of the court in an opinion in which Mr. Justice Douglas and Mr. Justice Burton joined (345 U. S. 462, 470), Justice Frankfurter wrote a separate opinion (345 U. S. 470-477) in which occurs this sentence: "The vital requirement is **State responsibility**—that somewhere, somehow, to some extent, there be an infusion of conduct by state officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored" (op. cit. p. 473, emphasis supplied). Justice Clark with whom Chief Justice Vinson and Justices Reed and Jackson joined, concurred (pp. 477-484). They (footnote 9) deemed the activities of the "Jaybird Democratic Association" unlawful under the independent reach of the Fifteenth Amendment. Justice Minton dissented (pages 484-494).

(The Court had in **Smith v. Allwright** [1944], 321 U. S. 649, 64 S. Ct. 757, 88 L. Ed. 987, held that the Democratic Party of itself, and perforce any other political party, was prohibited by the Fifteenth Amendment from conducting a racially discriminatory primary.)

Justices Black, Douglas and Burton in their opinion referred to Smith v. Allwright (op. cit. 466), and affirmed "the District Court's holding that the combined Jaybird-Democratic-general election machinery has deprived these petitioners of their right to vote on account of their race and color."

Justices Clark, Reed, Jackson and Chief Justice Vinson "agreed with Chief District Judge Kennerly that the Jaybird Democratic Association is a political party whose

activities fall within the Fifteenth Amendment's self-executing ban" (op. cit. 482).

They did not deem it necessary to consider the applicability of 8 U. S. C., Sec. 31 [afterwards Sec. 42, U. S. C., Sec. 1971 (a)]. They so stated at page 481.

So that the rationale of the opinions of these seven Justices seems to be: We held in Smith v. Allwright that rules of the Democratic Party of Texas excluding Negroes from voting in the party's primaries violated the Fifteenth Amendment; the acts of the Jaybird party were the acts of the State, and when the Jaybird party denied or abridged, it was denial or abridgement by the State of Texas.

The constitutionality of Title 42-1971 was not considered by the Court.

Collins v. Hardyman, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1253, was cited (345 U. S. at p. 481) and it was stated that that case expressly refrained from constitutional questions. The District Judge in the case at bar made a similar observation with respect to Collins v. Hardyman (R. 27).

While Collins v. Hardyman may have "refrained from constitutional questions," Justice Jackson speaking for the majority reiterated and emphasized the rule that the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful" (op. cit. p. 658, citing **Shelley v. Kraemer**, 334 U. S. 1, 13, 68 S. Ct. 836, 842, 92 L. Ed. 1161). And he called attention to the fact that Justice Douglas had written in **United States v. Williams**, 341 U. S. 70, 92, 71 S. Ct. 581, 593, that the Fourteenth Amendment does not protect against wrongs done by individuals.

Title 42 U. S. C., Sec. 1971, was merely a general statement of principle or of rights, without providing any sanction or remedy for its violation. When, in 1957, the Congress sought to implement it by providing a sanction or remedy

for its violation, Congress sought to use as an implement a statute of the very type which had been declared unconstitutional in **James v. Bowman**, 190. U. S. 127. Of that case, counsel for the United States make only one mention in their brief. They say of it: "In a subsequent case, James v. Bowman, 190 U. S. 127, this court held that the Fifteenth Amendment applies only to governmental action and that legislation purporting to be an exercise of the power granted by Section 2 of the amendment which proscribed acts of private individuals was not 'appropriate legislation' within the meaning of that amendment."

Let us lay side by side the statute involved in James v. Bowman, and that section of the Civil Rights Act of 1957 now known as Title 42, U. S. C., Sec. 1971 (c):

Section 5507 of Revised Statutes	**Title 42, U. S. C., Sec. 1971 (c)**
"Every **person** who prevents, hinders, controls, or intimidates **another** from exercising, or in exercising, the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats of depriving such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section." (Emphasis added.)	"Whenever any **person** has engaged or there are reasonable grounds to believe that **any person** is about to engage in any act or practice which would deprive any **other person** of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order or other order . . ." (Emphasis added.)

ments whether interstate or intrastate, it is void as an attempt to regulate intrastate commerce, notwithstanding it is the same line as that fixed for a similar purpose as to intrastate shipments by the State through which it passes."

In the course of the opinion, Justice Day wrote:

"Nor have we the power to so limit the Secretary's order as to make it apply only to interstate commerce, which it is urged is all that is here involved. For aught that appears from the face of the order, the Secretary intended it to apply to all commerce, and whether he would have made such an order, if strictly limited to interstate commerce, we have no means of knowing" (op. cit. p. 529).

The same language was quoted by the Court in **Butts v. Merchants Transportation Co.**, 230 U. S. 126, 134, a case which involved the constitutionality of Sections 1 and 2 of the Civil Rights Act of March 1, 1875, as applied to vessels of the United States engaged in the coastwide trade.

The ruling of the unanimous court was:

"The provisions of the Civil Rights Act having been declared unconstitutional as to their operation within the States, Civil Rights Cases, 109 U. S. 3, they are not separable as to their operation in such places as are under the exclusive jurisdiction of the National Government and the statute is therefore unconstitutional in its entirety. The Trade Mark Cases, 100 U. S. 82."

The Butts case was an action to recover penalties.

At page 26 of their brief, counsel for the government make this sweeping statement:

"But there is no need to distinguish the Reese case because, for at least forty years, the approach there

taken has not been followed by this Court." (Here follows a footnote 9 which reads: During the approximate thirty-year period after the decision in the Reese case, the Reese approach was followed in a few cases. See, e. g., Trade-Mark Cases, 100 U. S. 82; Illinois Central Railroad v. McKendree, 203 U. S. 514; The Employers' Liability Cases, 207 U. S. 463; decided in 1879, 1906 and 1908, respectively. But, since then, it has generally been disregarded.) See, e. g., **El Paso & N. E. Ry. Co. v. Gutierrez**, 215 U. S. 87, and the cases discussed at pages 18-22, supra, in several of which the Court found that the statute was valid as applied and refused to consider the question of its validity in hypothetical circumstances, in effect severing one application from another."

In making such a statement, counsel for the Government have either overlooked, or hope we have overlooked, this Butts case. They do not even cite it. Their failure to cite it is natural, for it absolutely refutes their contention that El Paso & N. E. Ry. Co. v. Gutierrez has supplanted the Reese case. The Butts case, decided June 16, 1913, expressly distinguishes El Paso and N. E. Ry. Co. v. Gutierrez (op. cit. pages 137 and 138) and follows the Reese case (p. 133) as well as the Trade-Mark cases, and the other cases cited by the Government in their footnote 9. The Butts case was a unanimous decision handed down by a court composed of Chief Justice White, and Associate Justices McKenna, Holmes, Day, Lurton, Hughes, Van Devanter, Lamar and Pitney.

The words of the court in the Butts case were paraphrased and applied by the court in 1936 in **Carter v. Carter Coal Co.**, 298 U. S. 238, 316 (56 S. Ct. 875).

It was cited approvingly in **Williams v. Standard Oil Co.**, 278 U. S. 235, 242, and its rule recognized by Justice Brandeis in **The Chicago Junction case** (1924), 264 U. S. at page 290.

Mr. Chief Justice Taft writing for a unanimous court cited the Reese case and the Butts case approvingly in **Hill v. Wallace**, 259 U. S. 44, 70 (42 S. Ct. 459).

And regardless of what may be the fate of **United States ex rel. Guagliardo v. McElroy**, 259 F. 2d 927 (certiorari granted, 359 U. S. 904, 79 S. Ct. 580); in this court, the Government must have known the rule of the Reese case, and the Butts case was followed in it by the United States Court of Appeals for the District of Columbia Circuit as late as September 12, 1958. The majority there cited approvingly not only the Reese case and the Butts case, but another decision of Chief Justice Taft's which had followed and applied them, namely, **Yu Cong Eng v. Trinidad**, 271 U. S. 500, 518-522, 46 S. Ct. 619, 623-625.

Whether or not the statute is penal makes no difference in the application of the rule of law of the Reese case. But, if it did—this statute is penal in its nature. While Section 42-1971 (c) authorizes the institution of a civil action for preventive relief, Section 42-1971 (e), a part of the same Act, provides for the citation and trial of persons cited for contempt under this Act.

The Reese case was followed in the **Trade Mark Cases**, 100 U. S. 82, 98. There the precise ruling was:

> "That legislation is void for want of constitutional authority, inasmuch as it is so framed that its provisions are applicable to all commerce, and cannot be confined to that which is subject to the control of Congress."

United States v. Reese, supra, was affirmed and applied in **Baldwin v. Franks**, 120 U. S. 678.

In **United States v. Ju Toy**, 198 U. S. 253, 262, Mr. Justice Holmes said that the principle of the Reese case "has been decided over and over again."

Counsel for the Government argue that this case "is one to which the rule of 'standing to challenge' clearly applies" (Brief, p. 20).

They say the "District Court permitted the defendants to challenge the validity of the Act on the ground that it might be applied to private action as well as state action, although these defendants were engaged in state action when they performed the acts alleged in the complaint" (Ibid).

As a matter of fact, as we have shown somewhat more in detail, the complaint alleges that the acts and practices complained of were "designed and intended by defendants . . ." (R. 4); that they "arbitrarily and without legal cause" prevented the Negro citizens from demonstrating their ability (R. 6); that they "arbitrarily and without legal cause" rejected another (R. 7); that the "application of different standards by defendants . . . was not accidental, but was designed and intended by them to discriminate against Negro applicants . . ." (R. 7).

If these allegations are true, the actions of defendants (appellees) could certainly not be classified as "state action". More certainly what they did, if they did, could not be classified as an abridgement or a denial on the part of the State of Georgia.

This so-called "standing to challenge" rule was comparatively recently considered by the Court in **Barrows v. Jackson**, 346 U. S. 249 (1953). In an opinion written by Mr. Justice Minton, evidently concurred in by Associate Justices Black, Frankfurter, Douglas, Burton and Clark, it is stated:

> "This is a salutary rule, the validity of which we reaffirm. But in the instant case, we are faced with a unique situation in which it is the action of the state **court** which might result in a denial of constitutional rights and in which it would be difficult if not

impossible for the persons whose rights are asserted to present their grievances before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, **which is only a rule of practice,** are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained. Cf. Quong Ham Wah Co. v. Industrial Acc. Comm., 184 Cal. 26, 192, p. 1021, 12 ALR 1190. **In other unique situations** which have arisen in the past, **broad constitutional policy** has led the Court to proceed without regard to its usual rule" (op. cit. 346 U. S. 257, 73 S. Ct. 1035) (Emphasis added, except as to word "court").

Then follow some nine examples of cases in which the Court had proceeded without regard to the rule.

Perhaps, if it were necessary, the Court would here permit "broad constitutional policy" to outweigh this "rule of practice."

It is not necessary that the court take that action.

Under the circumstances here, the appellees had a perfect legal right and perfect standing to assail the validity of the statute.

In the first place there exists "no other basis for an action by the Attorney General in the name of the United States seeking the remedy here sought" (R. 40) than the act attacked. If it is void, the court had no jurisdiction of the action.

In the second place, these appellees **are** in position to assert that the act is an entirety and that its invalidity in certain respects renders the whole act invalid.

In support of the foregoing two propositions we refer to 11 American Jurisprudence, Constitutional Law, Section 112.

In **Mountain Timber Company v. Washington**, 243 U. S. 219, the Court considered the constitutionality of the Workmen's Compensation Act of the State of Washington. At the threshold, it held:

> "The act not being valid against employers if not valid as against employees, an employer may question its constitutionality in both aspects" (243 U. S. 220).

Applying that principle here—The statute not being valid against states or persons allegedly acting for states if it is not valid as against persons not acting for states, a state or persons allegedly acting for states may question its constitutionality in both aspects.

> "One having a claim against a city for personal injuries sustained in consequence of a defect in a street may question the constitutionality of a charter provision making actual knowledge of a city officer for at least twenty-four hours prior to the occurrence of the injury or damage a condition of liability for injury to person or damage to property, as violating a constitutional provision against the taking of property for public use without adequate compensation being made, since the invalidity of the charter provision so far as it relates to damage to property will render the entire act void."

Hanks, et ux. v. City of Port Arthur, 121 Texas 202, 48 S. W. 2d 944, 83 ALR 278, 279 (4).

At page 283 (of 83 ALR) Chief Justice Cureton speaking for the court said:

> "It is true that in the case before us the question of taking property in violation of the Constitution is not in issue, but the validity of the charter section may be raised, and, if void for any reason, it cannot be enforced in this case. 12 Corpus Juris, p. 764; People v. McBride, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; State v. Bengsch, 170 Mo. 81, 70

S. W. 710; State v. Cumberland Club, 136 Tenn. 84, 188 S. W. 583."

"The receiver of an insolvent state bank in the assets of which a preference is claimed under a state 'Bank Collection Code' with respect to a clearance draft drawn by such bank in favor of the claimant has a right to raise the question of constitutionality of the act on the ground of its invalidity as applied to national banks and the inseparability of its provisions rendering it invalid in its entirety."

People of the State of Illinois ex rel., Barrett v. Union Bank and Trust Co., 362 Ill. 164, 199 N. E. 272, 104 ALR 1090 (6).

In the third place, these appellees are "persons" who have a right to challenge the validity of all parts of the Act. True it is that the complaint alleges that while they were discharging their duties as registrars they "were acting under color of law of the State of Georgia" (R. 2). Equally true it is that the alleged acts and practices of the defendants complained of were allegedly **designed** by them, and intended by them to accomplish certain results. Equally true it is that they have allegedly acted "arbitrarily and without legal cause" (R. 6; R. 7). Their alleged designs, deeds and intentions are not the designs, deeds and intentions of the State of Georgia. Therefore even if their "acts and practices" were in fact committed, the "acts and practices" would not be those of the State of Georgia and therefore there would be no denial or abridgement on the part of the State of Georgia. These appellees are "persons" who have a right to challenge that portion of the statute which authorizes a suit against "persons." If these appellees had planned and done what they are accused in the complaint of having planned and done, those plans and acts would have been "without authority from the State and the State is in nowise involved." (**Orleans**

Parish School Board v. Bush, 242 F. 2d 156, 161, per Judges Tuttle, Rives and Brown.)

The same court which decided the Bush case, supra, also decided **Reddix v. Lucky,** 252 F. 2d 930. Judge Tuttle wrote the opinions in both cases. In the latter case Judge Borah concurred with him; Judge Cameron dissented from a holding that the complaint there stated a cause of action. The reason for the holding seemed to be that the complaint alleged "that the defendant, acting in her official capacity, participated in an illegal challenge of plaintiff's right to vote, and, by her own illegal failure to comply with the state law respecting the processing of such a challenge, caused his name to be improperly struck from the voters' rolls, all of which acts were done by her solely because he was a member of the Negro race and in violation of specified provisions of the Constitution, . . ."

So it is that the Court held in the Bush case that the suit was not one against the State forbidden by the eleventh amendment because the laws under which the board purported to act were invalid, and that therefore the board was acting without authority from the State and the State was in nowise involved, while in Reddix v. Lucky it held that a suit could be maintained which had as its requisites abridgement or denial by a State under circumstances where the abridgements or denials were participation by the registrar in an illegal challenge of plaintiff's right to vote, and "her own illegal failure to comply with the state law."

Georgia Railroad and Banking Co. v. Redwine, 342 U. S. 299, 72 S. Ct. 321, 96 L. Ed. 325, was cited in the Bush case. It was not cited in Reddix v. Lucky.

There this Court said:

> "This court has long held that a suit to restrain unconstitutional action threatened by an individual

who is a state officer is not a suit against the state" (342 U. S. at p. 304).

That being true, how could unconstitutional actions designed and performed by individuals who are state officers, which actions are contrary to the laws of the State, be deemed a denial or abridgement by the State of the rights of those against whom the actions are directed?

Further the court said:

> "The State is free to carry out its functions without judicial interference directed at the sovereign or its agents, but this immunity from federal jurisdiction does not extend to individuals who act as officers without constitutional authority" (op. cit. 305-6).

This being true, does it not follow that the acts of individuals who act as officers without constitutional or state statutory authority can not be deemed abridgements or denials by the State?

Why does not the rule of Ex parte Young, 209 U. S. 123, 28 S. Ct. 441, 453, 52 L. Ed. 714, quoted in the Bush case (242 F. 2d 161), but not in Reddix v. Lucky, apply?

If these appellees designed and performed the acts alleged, why are they, too, not "stripped of (their) official or representative character and . . . subjected in (their) person(s) to the consequences of (their) individual conduct"? (See Snowden v. Hughes, 321 U. S. 1, 13, 16.)

The only obligation resting upon the United States with respect to the Fourteenth and Fifteenth Amendments is to see that the **States** do not deny rights secured by the amendments. This the amendments guarantee, but no more. The power of the national government is limited to the enforcement of this guaranty. **Cruikshank v. United States**, 92 U. S. 542, 555.

Section 42 U. S. C. 1971 (a), as it existed prior to the passage of the Civil Rights Act of 1957, had been 42

Of Section 5507, this court said more than a half century ago:

The Fifteenth Amendment "relates solely to action by the United States or by any State and does not contemplate wrongful individual acts. While Congress has ample power in respect to elections of Representatives to Congress, Sec. 5507 cannot be sustained under such general power because Congress did not act in the exercise of such power. On its face the section is clearly an attempt to exercise power supposed to be conferred by the Fifteenth Amendment in respect to all elections, State and Federal, and not in pursuance of the general control by Congress over particular elections. It would be judicial legislation for this court to change a statute enacted to prevent bribery of persons named in the Fifteenth Amendment at all elections, to one punishing bribery of any voter at certain elections."

James v. Bowman, 190 U. S. 127.

In the light of this decision, and of all the others which have been cited, we cannot but wonder why the Congress chose so to implement Section 42, U. S. C., Sec. 1971. Were not the Executive and Legislative Departments convinced of the unconstitutionality of that legislation which is now Title 42, Section 1971 (c), as linked with 1971 (a)? Did those departments think the Judicial Department was wrong in those prior rulings? Or did they think they could persuade the Judicial Department to alter its previous rulings?

There is a doctrine being preached that people are evil who pursue either one of the courses indicated by these queries.

We respectfully submit that under the law of the land as it has been declared for almost a century, the District Judge was correct in holding that the legislation he held

unconstitutional was not appropriate legislation within the meaning of Section 2 of the Fifteenth Amendment to the Constitution of the United States.

THE CROSS-APPEAL.

The additional questions presented by the cross-appeal are shown at pages 43-44 of the record.

Questions 1 and 4* of the cross-appeal may be discussed together, for we submit that the Congress does not have the power to authorize the Attorney General to institute for the United States a civil action of the nature described in Title 42, U. S. C. A., Sections 1971 (c) and (d).

Section 1971 (c) has been quoted.

Section 1971 (d) is:

> "The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law."

Under Title 28, U. S. C., Sec. 1345, district courts of the United States have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

---

* These questions are:

"1. Whether the Congress of the United States, under the Constitution of the United States, had any authority to authorize the Attorney General of the United States to institute a civil action for preventive relief for or on behalf of the United States of the nature described in 42 United States Code 1971 (c), and under the circumstances therein stated;"

"4. Whether Congress has the right, under the Constitution of the United States, to direct District Courts of the United States to exercise their jurisdiction, and grant preventive relief as to acts with respect to which persons aggrieved had not exhausted their other remedies;" (R. 43-44).

The United States has no authority to commence this action and seek the relief it does seek in the absence of a valid act authorizing it so to do.

Does the Congress have the power to authorize the Attorney General to institute a civil action of the nature described in Title 42, U. S. C. A., Sections 1971 (c) and (d)?

> "One of the fundamental principles of the American constitutional system is that the governmental powers are divided among the three departments of government, the legislative, executive and judicial, and that each of these is separate from the others."
>
> 11 Am. Jur., Constitutional Law, Sec. 180.

> "Its object is basic and vital, Springer v. Government of Philippine Islands, 277 U. S. 189, 201; namely to preclude a commingling of these essentially different powers of government in the same hands."
>
> O'Donoghue v. United States, 289 U. S. 516, 530.

> "The judicial power shall extend to all cases in law and equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; to all cases affecting Ambassadors, other public Ministers and Consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a State and citizens of another State; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."
>
> Constitution, Art. 3, Sec. 2, cl. 1.

In the court below, the Government indulged in the assumption that we assume that the judicial power of the

United States under this provision extends **only** to cases in law and equity arising under the Constitution, laws and treaties of the United States.

That is not our assumption or argument.

We recognize that the judicial power extends to nine classes of cases.

We are co[illegible]erned here with only two of these classes—with only one, really. For, while "Article III also gives jurisdiction to the courts in 'controversies' to which the United States shall be a party, whether or not such controversy be also a case in law or equity," the question here is whether the United States of America is properly a party. The United States of America could not institute and prosecute this suit and seek the relief sought in it were it not for the Civil Rights Act of 1957. So the question is:

Does the Congress of the United States have the constitutional power to authorize the Attorney General to institute for the United States, or in the name of the United States, **an action in equity** whenever any person shall have engaged in certain acts or practices which would deprive other persons of certain rights, and to provide that the District Courts of the United States shall have jurisdiction of such an action and shall exercise that jurisdiction without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law?

The Court will notice that in stating the question we use the phrase, "an action in equity." We substitute that phrase for the words of the statute which are: ". . . a civil action or other proceeding for preventive relief, including an application for a permanent injunction, restraining order, or other order . . ."

We make that substitution because the only civil action which could result in orders or decrees granting pre-

ventive relief, or restraint or injunctive relief, would be an action in equity.

And thus the question is even more narrowed.

Does the Congress have the constitutional power to authorize the Attorney General to institute in the name of the United States an action for injunction seeking redress not of wrongs done or threatened to the United States but for alleged deprivations of the rights of persons, and to direct the courts to exercise jurisdiction of such a proceeding and to exercise it without regard to whether the party aggrieved shall have exhausted any administrative or other remedies which may be provided by law?

That statute violates the fundamental principle of the American constitutional system in that in it the legislative department encroaches upon the exclusive powers of the judiciary. The legislative department attempts to tell the judiciary: "You **shall** exercise the jurisdiction we are conferring on you; you shall exercise that jurisdiction without regard to whether the party aggrieved shall have exhausted his remedy at law or not; you shall exercise that jurisdiction regardless of whether the aggrieved party shall have an adequate remedy at law or not; you shall discard the fundamental rule of equity jurisprudence that "a suitor must exhaust his administrative remedies before seeking the extraordinary relief of a court of equity . . . is of special force when resort is had to the federal courts to restrain the action of state officers." (**Natural Gas Pipe Line Co. v. Slattery**, 302 U. S. 300, 310, with citation of cases.)

That statute authorizes the institution of a proceeding seeking equitable remedies, which so far departs from the established principles of equity jurisprudence that an action instituted pursuant to it cannot be deemed a case in law or equity arising under the Constitution or laws of the United States.

It cannot be deemed a case in law for it must be a "civil action or other proper proceeding for preventive relief" [the words of the statute—section (c)].

It cannot be deemed a case "in equity" for the statute authorizing it attempts to strip the courts of every vestige of those fundamental principles upon which equity jurisdiction traditionally and constitutionally rests.

The law of this land is:

> "The settled ground upon which equity jurisdiction rests and doubtless the great underlying principle on which it was originally assumed is the lack of an adequate and complete remedy at law. This is likewise the foundation and indispensable prerequisite for the exercise by equity of its power to grant injunctive relief."
>
> 28 Am. Jur., p. 232, Injunctions, Sec. 37;
> Fox v. Standard Oil Co., 294 U. S. 87;
> Lee v. Brickell, 292 U. S. 415;
> Phoenix Mut. Ins. Co. v. Bailey, 13 Wall. 616.

The statute [42-1971 (c) (d)] authorizes the institution by the Attorney General of a civil action seeking equitable relief which action would lack every principle of equity jurisdiction.

The statute authorizes such a proceeding not because the United States of America or the party aggrieved would be entitled to it under what had been the law of the land since there has been a land (**Irwin v. Dixon,** 9 Howard 10, **Truly v. Wanzer,** 5 Howard 141); it authorizes it not on the basis of "those fundamental and established principles by which courts of equity are guided and influenced in their judicial action and in the administration of relief" (28 Am. Jur. 216; Injunctions, Sec. 23); it authorizes it without the necessity of the complainant establishing that the relief sought is necessary to prevent great and irreparable injury (28 Am. Jur., p. 242; Ibid, p. 217, Sec. 24).

It authorizes the institution of an equitable proceeding merely because a majority Congress deemed it desirable to wipe out all principles of equity jurisprudence in the field of "Civil Rights."

Fortunately for the people of the United States, Congress has no such constitutional right. For if Congress can wipe out those principles in one field, it can in all. Equity jurisdiction is what it is. Equity jurisdiction is what the courts declare it is, not what Congress says it is.

By virtue of the constitutional recognition of the division of ordinary civil jurisdiction of the Federal Courts into cases at law and cases in equity it is beyond the power of Congress to make any serious change in that classification (19 Am. Jur., p. 44, n. 16).

One of the reasons for such lack of power is that the right of trial by jury is preserved by the Seventh Amendment in suits at common law.

Congress cannot convert a law action into an action in equity by legislative fiat, and thereby deprive defendants of whatever rights they may have as to a jury trial.

Congress cannot create a cause of action in some suitor, even the United States of America, and clothe it with the attributes of an action in equity when it is not an action in equity.

Congress cannot create a cause of action in some suitor, even the United States of America, and confer upon that suitor extraordinary rights and privileges when the suitor, under established principles of equity jurisprudence, is not entitled to them.

To decide that Congress has any such power is to ignore the well established principle that the line between equitable and common law jurisdiction must be maintained.

Heine v. Levee Commissioners, 19 Wall. 655, 660.

The Seventh Amendment must be construed in the light of the practice in the courts of law and chancery in England when our Constitution and that amendment were adopted.

Liberty Oil Co. v. Condon National Bank, et al., 260 U. S. 235, 243, 43 S. Ct. 118 (7).

So must the phrase "cases in equity" be construed.

"The jurisdiction in equity of the Federal courts is, subject to the limitations of the Constitution, substantially the same as that of the English Court of Chancery."

Foster's Federal Practice, Vol. 1, Section 5, citing:
Root v. Railway Co., 105 U. S. 189;
Fenn v. Holme, 21 Howard 481.

"Equity jurisdiction, of course, is a basis for action or realm of power dependent upon chancery precedents of long standing and to which recourse must still be had to determine whether any relief can be granted in a particular situation."

Cyclopedia of Federal Procedure, Third Edition, Vol. 1, Sec. 20164.

The jurisdiction conferred on the Federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was administered by the English court of chancery at the time of the separation of the two countries.

Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U. S. 563, 83 L. Ed. 987, 59 S. Ct. 657, 660, citing:

Payne v. Hook, 7 Wall. 425, 430;
In re: Sawyer, 124 U. S. 200, 209;
Matthews v. Rodgers, 284 U. S. 521;
Gordon v. Washington, 295 U. S. 30.

While Justice Stone was there dealing with the phrase "in equity" as used in Section 11 of the Judiciary Act of

1789, the same reasoning would apply to the use of the same phrase in the Constitution.

> "The Courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior Federal courts are concerned, however, it is not beyond the authority of Congress . . .; but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative."
>
> Michaelson v. United States ex rel. C. St. P. M. & O. R. Co., 266 U. S. 42, 35 ALR at p. 457.

While there the court was discussing the inherent power of a court to punish contempts, a fortiori would the principle apply to a suit "in equity."

That is demonstrated by the citation by the Supreme Court of the Michaelson case in **Sprague v. Ticonic National Bank**, 307 U. S. 161, 165, 59 S. Ct. 777, 779, holding: "The suits 'in equity' of which these courts were given 'cognizance' ever since the First Judiciary Act constituted that body of remedies, procedures and practices which theretofore had been evolved in the English court of chancery, subject, of course, to modifications but not subject to a total destruction of the inherent attributes."

"The remedies in the courts of the United States, at common law and in equity, are to be . . . according to the principles of common law and equity, as distinguished in that country from which we derive our knowledge of these principles."

Robinson v. Campbell, 3 Wheaton 212 (1818).

Constitution 1874, Art. 7, Sec. 15, conferring on the circuit courts jurisdiction in matters of equity until the legislature shall establish courts of chancery, refers to such jurisdiction as a court of chancery could properly exercise

at the time of the adoption of the Constitution, and, though the Legislature may create courts of chancery and vest the same with jurisdiction in matters of equity, it may not enlarge their jurisdiction when created.

Gladish v. Lovewell, 130 S. W. 579, 581, 95 Ark. 618.

What are some of the inherent attributes to the exercise of equity jurisdiction of which this statute would strip the District Courts?

It is fundamental, in equity jurisprudence, that the complainant must stand or fall on the merits of his own case. The Supreme Court stated the principle in **McCabe v. AT&SF R. Co.** (1914), 335 U. S. 151, 162, thus:

> "But we are dealing here with the case of the complainants and nothing is shown to entitle them to an injunction. It is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainants' need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons, who may be injured, are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention."
>
> "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights. Equitable relief may be granted only when the District Court, in its sound discretion exercised with 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal

courts.' Considering that 'few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. Whatever rights appellee may have are to be pursued through the state courts.''

Alabama Public Service Commission et al. v. Southern Railway Co., 341 U. S. 341, 349-50.

If the Lowes, the Gibsons, and Breedlove, had been deprived of any right secured to them by the Fifteenth Amendment, the Congress of the United States would not have the constitutional power to **direct** a Federal District Court to take jurisdiction of a proceeding instituted by them seeking general supervision over registration of negroes in the county of their residence, and compel that Court to exercise that jurisdiction whether the complainants had exhausted any administrative or other remedies that may be provided by law.

A fortiori, the Congress of the United States has not the constitutional power to authorize the Attorney General to institute a civil action seeking an injunction because persons had been or were about to be deprived of their rights; to direct a Federal District Court to take jurisdiction of such a proceeding; and to compel that court to exercise that jurisdiction whether these persons had exhausted their administrative or other remedies provided to them by law, and in so doing deny a jury trial to those sued by the United States.

The Constitution of the United States simply does not comprehend such an action as being within the purview of the phrase ''action in equity'' as used in the Constitution. **(Brown v. Board of Trustees of LaGrange Independent School District et al.,** 187 F. 2d 20 [5th Cir.].)

Question 2 of the cross appeal is:

"Whether, even if Part IV of the Civil Rights Act of 1957 is constitutional, the complaint states a cause of action upon which the relief sought can be granted."

Does it not reveal on its face that the negro citizens named therein have not been deprived by the State of Georgia of any right to vote which they may have, and further, does it not show on its face that the State of Georgia has not abridged any right to vote which they may have?

Preliminary to a discussion of these questions, we suggest that the complaint tacitly admits the invalidity of the statute.

The statute purportedly authorized the Attorney General to institute a civil action whenever any person had engaged or there were reasonable grounds to believe that any person was about to engage in any act or practice which would deprive any other person of a right or privilege secured by subsections (a) or (b).

The statutory key given to the Attorney General to unlock the door of the Federal Courts was an act or practice of a **person.**

The Department of Justice doubtless realized that such a key lacked constitutional validity under the Fifteenth Amendment. It must have realized that for the Fifteenth Amendment to become operative, the United States or a State must be guilty of acts or practices constituting denials or abridgements.

Seeking to cure this fundamental defect in the statute, and so to amend it, the complaint alleges that the defendants in their official capacities "are and have been responsible for the registering in that county of qualified persons who desire to vote," and that "while discharging the duties of the offices aforesaid were acting under **color of law,** of the State of Georgia." (Emphasis added.)

We confidently assert that **even if** the statute had contained a provision that the acts or practices engaged in by "any person," must have been done "under color of law of a State or the United States," that additional provision would not have rendered the statute constitutionally valid.

We so contend because it is fundamental that for Congress to be authorized to enact legislation pursuant to the Fifteenth Amendment, the legislation must be appropriate. The legislation cannot be appropriate unless it deals with denials or abridgements by a State or the United States; with acts done by or under the authority of the Constitution or laws of any State, Territory or the United States.

The Congress which enacted the Civil Rights Act of 1870 realized that in Sections 2 and 3 of the Act.

Of course, the abridgements and denials must have the additional factor of having been done on account of race or color.

A fortiori, if the statute does not contain those essential elements, they cannot be supplied by an averment in the complaint.

The complaint does not state a claim upon which relief can be granted because:

(1) The statute which purportedly authorizes the Attorney General to institute it lacks the essential elements of abridgement or denial by the State on account of race or color which must constitutionally be conditions of any appropriate legislation;

(2) The complaint itself negatives those essential elements.

We have previously herein very much in detail pointed out that the alleged acts of the defendants were their individual acts (Complaint, paragraphs 9, 14, 16, 18) (Record, pages 3, 6, 7).

In the Government's brief in the court below it was stated:

> "The standards which are a prerequisite to registration in Georgia are not here under attack, **but only the practices of certain state officials in administering those standards.**" (Emphasis added.)

When we realize, as we must, that the Congress can legislate, the Courts can adjudicate, only when the United States or a State denies or abridges a person's right to vote on account of race or color, would not that statement have been sufficient to necessitate a dismissal of this action?

We realize, of course, that it has been stated in some cases (e. g., **Peavy v. Cox**, 190 F. 2d 123; **Cook v. Davis**, 178 F. 2d 595) that "the fact that he is an officer acting under color of State law makes what he does State action within the prohibition of the Fifteenth Amendment."

Because of such statements, it has been **assumed** that the phrase "state action" was the legal equivalent to denial or abridgement by a State.

Those statements and assumptions are not decisive of the question here made.

Those questions are: Is there a deprivation or abridgement by a State within the meaning of the Fifteenth Amendment when registrars design practices of their own, and arbitrarily refuse to apply the State law, as alleged here? (That is the fifth question in the cross-appeal.)*

There cannot be an abridgement or denial by the State within the meaning of the Fifteenth Amendment until the corrective processes permitted by the State law have been followed. The **State** cannot be said to have deprived or

---

* "5. Whether the right of citizens of the United States to vote is denied or abridged by a State when voting registrars charged with the duty of administering state laws allegedly design practices of their own, and allegedly arbitrarily refuse to apply the state law;" (R. 44).

abridged a person's rights when, as alleged here, persons design practices for the purpose of arbitrary discrimination in violation of ..e State laws, and the person aggrieved does not avail himself of the corrective remedies the State has provided.

By its Act of 1958 (Ga. Ann. Code, Pocket Part, Sections 34-117, et seq.) Georgia has provided that when an applicant appears before a board of registrars for examination, the board **shall** proceed as provided in that Act. [See Appendix hereof "A" for Sec. 34-117 (a) and (b).]

If the applicant qualifies on the basis of literacy (Sec. 34-117), his "card **shall** be marked approved, and the applicant **shall** be considered a registered voter." Throughout this subsection the imperative "shall" is used.

If the applicant seeks to qualify on the basis of good character and understanding of citizenship [34-117 (b)], he "shall be given an examination based upon a standard list of questions as hereinafter provided."

Throughout the following section providing for an oral examination (Sec. 34-118) (Appendix B), the word "shall" is used—seven times. The next section (Sec. 34-119) (Appendix C) provides for a standard list of questions which **shall** be propounded. When the registrars under the statute (Sec. 34-122) perfect a true and correct list of the qualified voters, they **shall** place on those lists certain persons.

If a registrar "designs" acts and practices, intended by him to deny citizens the right to vote (Par. 9 of complaint, R. pp. 3-4); **if** he arbitrarily and discriminatorily delays handling applications of negroes; **if** he **arbitrarily** refuses to register negroes who are actually qualified; **if** he discriminatorily applies different and more stringent standards to negroes than those applied to whites, he is proceeding, not only in violation of provisions of state law, but in opposition to plain prohibitions of the State law.

His acts and practices, therefore, cannot be deemed the **constitutional** equivalent of denial or abridgement **by the State.**

A fortiori is this true when the State has not been given an opportunity to correct the alleged arbitrary and discriminatory conduct, although it has afforded a remedy for any person who is really seeking to register to vote.

(Code Sec. 34-116, Pocket part, Ann. Code);
(Appendix "D").

In this situation the unanimous ruling of the Supreme Court of the United States in **Barney v. The City of New York** (per Chief Justice Fuller), 193 U. S. 430, controls.

There the court held:

> "Where the jurisdiction of the Circuit Court is invoked on the ground of deprivation of property without due process of law in violation of the Fourteenth Amendment, it must appear at the outset that the alleged deprivation was by act of the State."

After reviewing several cases, and distinguishing **Reagan v. Farmers Loan and Trust Co.**, 154 U. S. 362, the court said:

> "In the present case defendants were proceeding, not only in violation of provisions of the state law, but in opposition to plain prohibitions."

In its brief below, the Government said: "The action is against voting officials of Terrell County, Georgia, to **enjoin their discriminatory acts in denial or abridgement of the right to vote**, on the sole ground of race, to otherwise qualified persons. The fact that they are officers acting pursuant to authority delegated by the State, and thus 'under color of State law,' renders their acts state action within the prohibition of the Fifteenth Amendment, but does not make the suit one against the state." Citing **Screws v. United States**, 325 U. S. 91. (Emphasis added.)

We emphasize certain words in the first quoted sentence because they are an admission by the Government that the action is not one to enjoin any denial or abridgement by the State of Georgia, but is one to enjoin discriminatory acts of persons who are registrars ("their discriminatory acts").

In drawing the conclusion it did from the Screws case, the Department of Justice entirely ignored the fact that Screws was prosecuted for violating a statute—Section 20 of the Criminal Code—which penalized willful deprivation under color of law of any right secured by the Constitution.

Here, the statute involved (Sec. 42-1971 a, c, d, e) does not contain the phrase "under color of State law."

If it did, we would have the Constitutional question: Is any act done by a public official **under color of State law,** unauthorized and prohibited by State law, an act of the State depriving or abridging one's right to vote by reason of race or color?

While **the complaint** alleges (R. 2) that the defendants were acting under color of State law, the complaint also shows: (a) That the acts were arbitrary; (b) That they were the result of designs, not of the State, but of the defendants; (c) That the State had not been given the opportunity to discipline them; (d) That the alleged acts of defendants were in violation of the State law; (e) That the alleged acts of the defendants were in opposition to plain prohibitions of the State law.

> "Where a city, in enacting a minimum rate ordinance, acts without legislative authority, the ordinance is not an 'act of the state' within the meaning of the Fourteenth Amendment to the federal Constitution, prohibiting a state from passing a law de-

priving a citizen of his property without due process of law, etc."

Portland Ry. Light & Power Co. v. City of Portland, 200 Fed. 890 (1).

"A municipal ordinance passed pursuant to the authority of the State which abridges the privileges or immunities of a citizen or deprives a person of property without due process of law may be therefore an act of the State prohibited by the Constitution. But the ordinance to come within the prohibition of the amendment must, by implication at least, express the will of the State. It must be the act of the State."

Seattle Electric Co. v. Seattle R. & S. Co. 185 Fed. 365 (4), 370 (This case is cited 13 ALR. 2d 399).

At page 370, it cites **City of Louisville v. Cumberland Telephone & Telegraph Co.**, 155 Fed. 725 (C. C. A. 6th Circuit), in which Judge Lurton writing for the court, held that a federal court was without jurisdiction of a suit to enjoin the enforcement of a municipal ordinance on the ground that it impaired the obligation of a contract or deprived the complainant of property without due process of law, in violation of the Constitution of the United States, when the bill alleged that no power had been granted to the municipality or legislature of the state to pass such ordinance.

That case cites:

Murray v. Charleston, 96 U. S. 432, 440;

New Orleans Water Works v. La. Sugar Co., 125 U. S. 18, 31;

Hamilton Gas Light Co. v. Hamilton (Justice Harlan), 146 U. S. 258, 266;

Iron Mountain R. Co. v. Memphis, 96 Fed. 113, 126;

St. Paul Gas Co. v. St. Paul, 181 U. S. 142, 148;

Barney v. City of New York, 193 U. S. 430;

Savannah, etc., Ry. Co. v. Savannah, 198 U. S. 392.

In this City of Louisville case, Justice Lurton pointed out as one of the bases for his holding (op. cit. p. 730), that the bill averred that the city council acted wholly without any authority from the state. Here, the complaint alleges that the defendants acted "arbitrarily and without legal cause" (par. 14) (R. 6). That allegation is repeated in paragraph 16 (R. 7). If the allegations of the complaint are true, the acts of the registrars are not acts of the State of Georgia, but merely the acts of "certain individuals acting unlawfully."

We also call attention to the following cases:

Dawson v. Columbia Trust Co., 197 U. S. 178;

Memphis v. Cumberland Tel. Co., 218 U. S. 624 (which approves Judge Lurton's opinion in the Louisville case, supra);

Prentis v. Atlantic Coast Line R. Co., 211 U. S. 230.

In this last cited case, a state railroad commission, granted power by the state constitution of Virginia to make and enforce rates, enacted and attempted to enforce railroad rates which were so low as to be confiscatory.

The railroads sought to enjoin the order before having appealed the order to the State Supreme Court of Appeals. The Supreme Court held that the suit should not have been commenced until the rate had been fixed by the body having the last word.

"No rate is irrevocably fixed by the State until the matter has been laid before the body having the last word" (op. cit. p. 231).

This phase of the case has nothing to do with the facet of exhaustion of administrative remedies. This simply illustrates that the State of Georgia cannot be said to have abridged or denied a person's right to vote until that person shall have had reviewed by Georgia's courts the alleged arbitrary and discriminatory action of the registrars.

Georgia's law provides for appeals which are tried in the superior court as other appeals. (Code, pocket part, 34-116) (Appendix D).

The general law as to other appeals is set out in Sections 6-101 et seq. of the Code.

> "An appeal to the superior court is a de novo investigation. It brings up the whole record from the court below, and all competent evidence shall be admissible on the trial thereof, whether adduced on a former trial or not; either party is entitled to be heard on the whole merits of the case."
>
> Code, Sec. 6-501.

On an appeal to the superior court, the case must be tried anew as if no trial had been had.

Hall v. First National Bank, 85 Ga. App. 498 (3).

"All appeals to the Superior Court shall be tried by a jury at the first term after the appeal has been entered" (Code Sec. 6-601).

From the judgment of the Superior Court there is the right of appeal to the Court of Appeals (Sec. 2-3708), or to the Supreme Court of Georgia, if a constitutional question is involved (Sec. 2-2704).

The statutes of Georgia specifically set out what the Board **shall** do in qualifying applicants for registration. In section 17 (a) [now Sec. 34-117 (a)], the word "shall" occurs eleven times; in section 17 (b) and 18 and 19, the word "shall" occurs eight times.

In **Shanks v. Banting Mfg. Co.**, 9 F. 2d 116, District Judge Killets of Ohio considered the Barney case, supra, and a later case which he said distinguished and narrowed it—**Home Telegraph and Telephone Co. v. Los Angeles**, 227 U. S. 278, 294, 33 S. Ct. 312, 57 L. Ed. 510.

From them, and similar cases, he deduced the rule:

> "In all cases, so far as we have been permitted to consider them, in which jurisdiction was maintained

in a federal court of first instance, without requiring diversity of citizenship, the State, acting through one of its agencies, **followed the course of its own legislation, exercising a discretion as to the interpretation and application of such legislation,** and the criterion existed that it was the state acting within its own authority which was contravening the Fourteenth Amendment. **Here this state agency acted contrary to state authority,** assuming plaintiff's contention, as to necessity of service, and it is to be presumed, as the state legislation provides for an opportunity to present the question to the state court, that, when its error is shown to it, it would be corrected. If not, the power of the federal court to enforce the Fourteenth Amendment follows . . . should the highest court in the state act to uphold an abuse of that constitutional safeguard" (op. cit. p. 118).

Here, assuming the averments of the complaint to be true, the defendants did not follow the course of Georgia's legislation. The defendants kept separate records as to applicants for registration, and used differently colored cards for white and negro applicants and voters. That was not a following of the course of the State's legislation. The State's legislation as to form and contents of the card is Section 34-108 of the Annotated Code, pocket part. The defendants designed the acts and practices complained of. **They** intentionally designed them. The defendants, not the State of Georgia, allegedly **arbitrarily** delayed handling applications for negroes, says the complaint. When certain applicants elected to take the literacy test (complaint, par. 14), the defendants allegedly did not exercise any discretion as to the interpretation and application of the statute, but **"arbitrarily and without legal cause"** prevented the applicants from demonstrating their ability to write correctly and legibly.

The complaint says that the defendants have applied different and more stringent registration standards to

negroes (Par. 17). That, if true, is their individual act, and not following the course of Georgia's legislation. That act, says the complaint (Par. 18), was not accidental. It "was designed and intended by **them** to discriminate against Negroes."

If the allegations of the complaint are true, the defendants have designed a plan of **their own**, not of the State, **intended by them** to discriminate against Negro applicants.

The United States of America certainly have **no** cause of action unless the parties allegedly aggrieved have. The "parties aggrieved" have no cause of action unless the State of Georgia has on account of their race or color denied them the right to vote or abridged their right to vote. The complaint shows affirmatively that the State of Georgia has done no such thing. If the allegations of the complaint are true the acts of the defendants were theirs individually. If the parties were "aggrieved," the grievances occurred on April 7, 1958. (Complaint, Par. 14, et seq.) They had ten days in which to appeal (Code, Sec. 34-116, Pocket Part). Under the statutes of Georgia, there was a regular term of the Superior Court of Terrell County set for the first Monday in June, 1958. Instead of pursuing the corrective remedy afforded by Georgia, they evidently appealed to the Department of Justice by which this action was filed September 4, 1958, five months after the alleged grievance.

In **Prentis v. Atlantic Coast Line et al.**, 211 U. S. at page 230, Mr. Justice Holmes used language which is apt here:

> "The State of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the State Corporation Commission; not only by the character of the members of that Commission, but by making its decisions dependent upon the assent of the same historic body that is entrusted with the preservation of the most valued constitutional rights, if the railroads see fit to appeal.

> It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the State in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States."

At page 231 of that same case, Justice Holmes said (for the majority of the Court): "No rate is irrevocably fixed by the State until the matter has been laid before the body having the last word."

We repeat: It isn't merely a matter of exhaustion of remedies—legislative, judicial or administrative.

The question is: Has the **State** deprived or abridged?

Question 3 of the Cross-Appeal is:

> **"Whether, even if Part IV of the Civil Rights Act of 1957 is constitutional, and even if the Complaint states a claim upon which the relief sought could be granted, should the action have been dismissed by the court in the exercise of its sound discretion."** (The court dealt with this in the opinion, R. 26-7.)

The circumstances here are: Five alleged negro citizens of Terrell County alleged that on April 8, 1958, the defendants designedly deprived them of their right to register and hence to vote. They had ten days in which to appeal to the Superior Court. The hearing on that appeal would have been a *de novo* hearing. That appeal would have been returnable to the June Term 1958 of the Superior Court. So far as the complaint discloses, no appeal was filed. There was an election for Governor (and other officers) in Georgia in November, 1958, with a primary preceding in September. Although allegedly desirous of voting, they made no effort to have the **alleged** intended, designed, arbitrary and illegal action of the defendants corrected by the legal process afforded them by Georgia law.

Instead they appealed to the Attorney General, who instituted this action, said to be the first of its kind under the 1957 Act (Government's brief below, p. 5).

The Attorney General, on September 4, 1958, instituted this action seeking in prayer 2 to have the Court order the Registrars to certify that the five negro citizens were eligible to vote, and seeking in the other prayers a sweeping, blanket injunction against the Registrars of Terrell County as to all negro citizens in the county.

"Judicial opinion cannot be controlled by legislative opinion of what are fundamental rights."

Rast v. Van Deman & Lewis, 240 U. S. at p. 366.

The inherent discretion which a Chancellor must exercise in determining whether or not to grant an injunction cannot be abrogated or restricted by the Congress.

The granting of an injunction rests in the sound discretion of the court to be exercised in accordance with well settled equitable principles and in the light of all the circumstances of the case.

Injunctions, 28 Am. Jur., Sec. 35.

Another factor to be considered is that there is no general election for Federal or State officers to be held in Georgia until 1960.

The circumstances under which even the Congress intended that the authority conferred upon the Attorney General should be used by him is conclusively demonstrated by the testimony of Attorney General Brownell during the hearings on the bill which became the Civil Rights Act of 1957.

During the hearings before the House subcommittee, he was questioned by Representative Miller (Republican of New York).

"Mr. Miller: Mr. Attorney General, on page 6 of the same bill, section 121, paragraph 4: 'Whenever any

persons have engaged or about to engage in any acts or practices,' from your experience as Attorney General during the past four years could you give me a hypothetical example of what might be 'about to engage in any act?'

"Mr. Brownell: Yes. For example, if you have a registrar of voters who arbitrarily strikes off **several thousand names of Negro voters,** shortly before the deadline for qualification of voters and gives no hearing to them or an inadequate hearing, then I would think that would be a case that would alert the Attorney General under this bill to the need for some injunctive action which would give those people **their day in court** and allow them, like any other citizen, the right of franchise.

"Mr. Miller: To be placed back on the books for the purpose **of the forthcoming** election so **they** would not lose their franchise **in that election,** which they would lose if they had to resort to a lengthy criminal proceeding.

"Mr. Brownell: That is right." (Emphasis added.)

(House Hearings of February 4, 5, 6, 7, Serial No. 1, p. 601.)

Then followed a few lines of colloquy, and the Attorney General said:

"It is a matter of concurrent jurisdiction, and **in an emergency** of the type you and I have just discussed, I think there should be nothing, either in the rules of the local board or regulations **OF THE STATE which would prevent a speedy hearing in time to do some good** . . ."

Then:

"Mr. Miller: And it would be presumed, of course, that the court would follow, and would not circumvent or ignore the State law on the subject of rules, so long as they were not arbitrary or discriminatory?

"Mr. Brownell: That is correct, but would exercise **general equity jurisdiction,** which would permit our district court to give due justice to all parties." (Emphasis supplied.)

This demonstrates that the declared purpose of the provision was to permit the Attorney General to act in an emergency where lacking such action thousands of voters would be disfranchised at a forthcoming election.

It further demonstrates that Congress did not intend that the District Courts should be deprived of the prime one of its general equity powers—its discretion to determine whether the circumstances warrant the use of "this strong arm of equity."

It further demonstrates that neither the Attorney General nor Congress intended that a District Court should either supplant or become an appeal board for States' Boards of Registrars.

When Attorney General Brownell testified before the Senate subcommittee he said about the same as to the purposes of the harsh remedy provided by the Act. (Senate hearings, pages 30-31, et seq.)

Rather prophetically, Senator Ervin stated:

"Ordinarily in North Carolina you can get an administrative remedy before you can get your pleadings drawn for the case in the Federal Court" (p. 31).

The Attorney General replied: "Then that would be much preferable."

The institution of this action was authorized despite the fact that no emergency existed, five voters were allegedly affected, no resort to the remedies afforded by the State was had, no effort was made to enforce these fives' alleged right to vote in the 1958 Georgia elections, but, with no Federal or State election in prospect until the fall of 1960, the Department of Justice asked the District Court of the

United States for the Middle District of Georgia to substitute itself for the State Board of Registrars of Terrell County.

It was urged below that the matter of the Court's exercising its discretion "is not properly raised by a motion." The Court below recognized that equitable relief might be denied in the exercise of the Court's discretion, but thought the discretion should be one informed by evidence. There are authorities to the contrary.

> "We think however that the remedy by injunction, which is a discretionary remedy even when the Court has jurisdiction to grant it, ought not to be had to control the State officer in the conduct of his office even though his conduct may appear to be wrong, until the remedy to correct him provided by the State has been exhausted. This rule is of special importance between the Federal Courts and State functionaries."
>
> Peay v. Cox, 190 F. 2d at p. 125 (C. C. A. 5).

Despite the language of Title 42 U. S. C. A. 1971 (c), and the effort of Congress to encroach upon the powers of the Judiciary, it remains a "discretionary remedy."

And the courts can exercise their discretion upon a reading of the complaint as well as after hearing evidence to support the complaint.

The Court would ask and answer: Assuming the statute is valid, assuming the complaint states a case upon which relief **could** be granted, **should** I, in the exercise of my discretion, grant it even if its allegations are true? **Should** I, in the light of the declared purpose of the bill, the fundamental principles of equity jurisprudence, and the circumstances existing?

Congress cannot expect the courts to break with historic principles of equity in the enforcement of equitable rights.

Holmberg v. Ambrecht, 327 U. S. 582.

"Discretionary refusal to exercise equitable power under the Civil Rights Act (of 1870, 1871) to interfere with state criminal prosecution is one of the devices sanctioned for preserving the proper balance between the States and the Federal government in law enforcement. 8 U. S. C. A., Sec. 42."

Stefanelli v. Minard, 342 U. S. 117, 72 S. Ct. 118 (h. n. 7).

"No such irreparable injury, clear and imminent" was threatened there.

Ibid, at p. 122.

"A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest (citing cases). It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative. The actuality of the plaintiff's need for a declaration of his rights is therefore of decisive importance."

Eccles v. Peoples Bank, 33 U. S. 431-2, 68 S. Ct. 644.

"A motion to dismiss a suit for declaratory judgment is addressed to the discretion of federal district court."

Brillheart v. Excess Ins. Co., 316 U. S. 491, 62 S. Ct. 1173 (h. n. 2).

"It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states."

Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293, 63 S. Ct. 1070.

In the recent case of **Aetna Ins. Co. v. Busby**, 87 F. Supp. 505, 507, Judge Lynne said:

". . . defendants' motion to dismiss the bill is addressed to the discretion of the court."

The sixth question in the Cross-Appeal is: Whether the District Court, in a proceeding under the Act, has the right to direct registrars to certify to the appropriate agency that certain named persons are eligible to register to vote.

This question springs from prayer (2) of the complaint (R. 8). There the Court was asked to enjoin the defendants from "failing or refusing, on the ground that the following persons failed to meet the requirements of the literacy test provided by the law of Georgia, to certify to the appropriate county or state official or agency that the said persons are eligible to register to vote in Terrell County: . . ."

A Court could hardly do that without holding a registration hearing to determine whether the five named persons are entitled to be registered under the Constitution and laws of Georgia. A Court need not yet concern itself with whether it will be converted into an appeal board supervising the methods of every Board of Registrars in the District, for the law does not grant jurisdiction to District Courts to pass any such order.

If a court should enjoin a man from not paying over to another a certain amount of money, that is equivalent to commanding him to pay over that amount. So if a Court should enjoin the defendants from not certifying the Lowes, and Gibsons, and Breedlove, it is equivalent to a mandamus compelling their certification.

It is axiomatic that Federal District Courts have no general original jurisdiction in mandamus proceedings.

Encyclopedia of Federal Procedure, 3rd Edition, Vol. 15, Section 84.34, citing among others:

Covington & Cincinnati Bridge Co. v. Hager, 203 U. S. 109;

Innes v. Hiatt, 57 F. Supp. 17.

In the latter case the Court said:

> "Moreover, treating the proceedings under the designation of 'injunction', it is in effect an attempt to obtain a mandamus against the Warden of the Penitentiary to change his records, and this Court has heretofore pointed out that where the action is not in aid of this court's jurisdiction but is an original proceeding in mandamus, the District Court has no jurisdiction. Hogan v. Hill, D. C., 9 F. Supp. 975, affirmed 3 Cir., 78 F. 2d 1017."

That court is not by itself. For many other cases of like nature, see Courts, Key Number 265, Federal Digest, and especially **Updegraff v. Talbott**, 221 F. 2d 342. That case, written by the late Judge Parker, cogently points out that district courts are without power to grant mandatory injunctions which in effect are writs of mandamus (op. cit. p. 345).

CONCLUSION.

What the Fifteenth Amendment meant in 1875, it means now.

> "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were

understood when made, are still within them, and those things not within them remain still excluded."

South Carolina v. United States, 199 U. S. at pages 448-9.

It indisputably appears that the Civil Rights Act of 1957 is so broad in its scope that it is thereby rendered void. It, in its entirety (42-1971 a, b, c, d, e) or even with subsection (b) ignored, is not appropriate legislation under the powers conferred by the Fifteenth Amendment.

Further, the action it authorizes to be brought is not an action "in equity" as contemplated by the Constitution.

The suit as brought must be authorized by the statute, or the United States has no right to sue. (United States v. Reese, supra.)

If the statute is so broad in its scope as to be unconstitutional, the attempt of the Department of Justice to narrow it, to amend it, and to save it by alleging "under color of office" doesn't save it.

The judgment of the District Court was right and should be affirmed.

Respectfully submitted,

CHARLES J. BLOCH,

ELLSWORTH HALL, JR.,
520-5 First National Bank Building,
Macon, Georgia,

ROBERT L. RUSSELL, JR.,
Winder, Georgia,

PETER ZACH GEER,
Colquitt, Georgia,
Counsel for Appellees.

APPENDIX.

(Showing Sections of Georgia Code Referred to in This Brief.)

A. 34-117. When an applicant appeals before the board of registrars for examination, the board shall proceed as hereinafter provided.

(a) If the applicant applies for registration and seeks to qualify on the basis of literacy, the board shall submit to him a section of the Constitution of Georgia or of the United States and the applicant shall be required to read it aloud and write it in the English language. If the applicant reads the section intelligibly and writes it legibly, possesses the other necessary qualifications and is not disqualified for any reason, the card shall be marked approved and the applicant shall be considered a registered voter. Otherwise, the registration card shall be marked rejected. If the applicant states that solely because of physical disability, he is unable to read or write, the section shall be read to him by any member of the board and he shall be called upon to give a reasonable interpretation thereof. The interpretation shall be in the applicant's own words, giving words the significance ordinarily attached to them by a layman of average intellect and attainments. If, in the opinion of the board, the applicant gives such a reasonable interpretation, possesses the other necessary qualifications and is not disqualified for any reason, the card shall be marked approved and the applicant shall be considered a registered voter. Otherwise, the registration card shall be marked rejected.

(b) If the applicant applies for registration and seeks to qualify on the basis of his good character and his understanding of the duties and obligations of citizenship

under a republican form of government, he shall be given an examination based upon a standard list of questions as hereinafter provided.

B. 34-118. The examination which the registrars shall submit to an applicant who claims the right to register on the basis of good character and understanding of the duties and obligations of citizenship under a republican form of government, shall be based upon a standard list of questions, and the questions on this list and no others shall be submitted to such applicant. In order to ascertain whether an applicant is eligible for qualification as a voter in this classification, the registrars shall orally propound to him the 30 questions on the standardized list set forth hereinafter. If the applicant can give correct answers to 20 of the 30 questions as they are propounded to him, possesses the other necessary qualifications and is not disqualified in any other way, the card shall be marked approved and the applicant shall be considered a registered voter. Otherwise, the registration card shall be marked rejected.

C. 34-119. The standard list of questions which shall be propounded to each applicant is as follows:

1. What is a republican form of government?

2. What are the names of the three branches of the United States government?

3. In what State Senatorial District do you live and what are the names of the county or counties in such district?

4. What is the name of the State Judicial Circuit in which you live and what are the names of the counties or county in such circuit?

5. What is the definition of a felony in Georgia?

6. How many Representatives are there in the Georgia House of Representatives and how does the Constitution of Georgia provide that they be apportioned among the several counties?

7. What does the Constitution of Georgia prescribe as the qualifications of Representatives in the Georgia House of Representatives?

8. How does the Constitution of the United States provide that it may be amended?

9. Who is the Chief Justice of the Supreme Court of Georgia and who is the Presiding Justice of that court?

10. Who may grant pardons and paroles in Georgia?

11. Who is the Solicitor General of the State Judicial Circuit in which you live and who is the judge of such circuit? (If such circuit has more than one judge, name them all.)

12. If the Governor of Georgia dies, who exercises the executive power, and if both the Governor and the person who succeeds him die, who exercises the executive power?

13. (a) What does the Constitution of the United States provide regarding the suspension of the privilege of the writ of habeas corpus?

(b) What does the Constitution of Georgia provide regarding the suspension of the writ of habeas corpus?

14. What are the names of the persons who occupy the following State offices in Georgia?

(1) Governor.

(2) Lieutenant Governor.

(3) Secretary of State.

(4) Attorney General.

(5) Comptroller General.

(6) State Treasurer.

(7) Commissioner of Agriculture.

(8) State School Superintendent.

(9) Commissioner of Labor.

15. How many Congressional Districts in Georgia are there and in which one do you live?

16. What is the term of office of a United States Senator?

17. What is the term of office of a State Senator?

18. What is the county site of your county?

19. How does the Constitution of Georgia provide that a county site may be changed?

20. What are the qualifications for jury service in Georgia?

21. What are the names of the persons who occupy the following offices in your county?

(1) Clerk of the Superior Court.

(2) Ordinary.

(3) Sheriff.

22. How may a new state be admitted into the Union?

23. On what day and how often is the general election held in Georgia at which members of the General Assembly of Georgia are elected?

24. What does the Constitution of the United States provide regarding the right of citizens to vote?

25. In what Federal Court District do you live?

26. What are the names of the Federal District Judges of Georgia?

27. Who are citizens of Georgia?

28. What is treason against the State of Georgia?

29. In what body does the Constitution of the United States declare that the legislative powers granted in such Constitution shall be vested?

30. How many electoral votes does Georgia have in the electoral college?

D. 34-116. All decisions of the registrars under this Chapter shall be subject to appeal. An appeal must be in writing and shall be filed with the registrars within 10 days from the date of the decision complained of. It shall be returned by the registrars to the office of the clerk of the superior court to be tried as other appeals. Pending the appeal and until final judgment in the case, the decision of the registrars shall remain of full force.